122-363

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 309.

EMMA C. WHITSITT, SOLE DEVISEE AND HEIR AT LAW OF RICHARD E. WHITSITT, DECEASED, APPELLANT,

vs.

THE UNION DEPOT AND RAILROAD COMPANY, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

FILED SEPTEMBER 22, 1884.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, APRIL 26, 1887.

1 Pleas in the circuit court of the United States for the district of Colorado, sitting at Denver.

Be it remembered that heretofore and on, to wit, the 5th day of May, A. D. 1880, came Richard E. Whitsitt and James Meskew, by Messrs. Wells, Smith & Macon, their solicitors, and filed in said court their bill of complaint, and sued out of and under the seal of said court a writ of subpœna in chancery against The Union Depot and Railroad Company, George W. Clayton, David C. Dodge, —— Taylor, James H. Place, —— Tobey, Denver, South Park and Pacific Railroad Company, Walter S. Cheeseman, and John W. Smith; and the said bill of complaint is in words and figures as follows, to wit:

Bill of Complaint.

UNITED STATES OF AMERICA, *District of Colorado:*

In the Circuit Court of the United States within and for said District, Sitting at Denver.

Richard E. Whitsitt and James Meskew, who are citizens of the State of Colorado, bring this bill against The Union Depot and Railroad Company, a corporation under the laws of the State of Colorado; —— Taylor, —— Tobey, and James H. Place, servants of the said company; George W. Clayton, David C. Dodge; The Denver, South Park and Pacific Railroad Company, also a corporation under the laws of the State of Colorado; Walter S. Cheesman, John W. Smith.

And thereupon the plaintiffs complain and say that heretofore, and about the year 1858, divers persons, citizens of the United States, including the plaintiff, Richard E. Whitsitt, among others, associated themselves together by the name of The Denver City Town Company, otherwise called The Denver Town Company, for the purpose of founding and establishing a town or city in the pub-

2 lic domain of the United States, and settling upon those certain lands then part of the unsurveyed public domain of the United States, and since designated, according to the public surveys, as section 33 and the west half of section 34, in township 3 south, of range 68 west, of the 6th principal meridian; and afterwards and about the same time surveyed and subdivided the same into city lots and blocks, streets and alleys, and occupied the same as a town site, by them called the city of Denver or Denver city, and erected upon each forty acres of each quarter section of said premises divers houses and other improvements, and caused public roads to be surveyed and opened and bridges to be built thereon to facilitate access from the inhabited portions of the United States to the said town or city, and erected or procured to be erected, at and within the said town, divers hotels, corrals, public stables, and other like buildings for the accommodation of citizens of the United States and others who might journey to the said town.

That afterwards, and about the 11th day of May, A. D. 1859, the said Denver Town Company set off, allotted, and donated, to a certain

association, corporation, or partnership known as the Leavenworth City and Pike's Peak Express Company certain lots in the said town site, and among others those certain lots known and described in the survey of the said town site hereinbefore mentioned and now known and described as lots 15 and 16, in block 14, in the east division of the city of Denver, and at about the same time admitted the said Leavenworth City and Pike's Peak Express Company to possession of some of said lots; and the said Leavenworth City and Pike's Peak Express Company thereupon and about that same time entered into the possession and occupancy of some of the said lots—among others, lot —, in block —, in the said town site, and erected thereon lasting and valuable improvements, and thereat and thereon carried on their business of a common carrier of freight and passengers; and on or about the 11th day of May, A. D. 1859, the said Denver Town Company, by their certain deed or agreement in writing afterwards and about the
3 first day of February, A. D. 1860, recorded in the office — the recorder of said county of Arapahoe, and now of record in the office of the recorder of said county of Arapahoe, donated and conveyed the said lots and parcels of land to the said Leavenworth City and Pike's Peak Express Company; that afterwards and on or about the 14th day of April, A. D. 1860, the said Leavenworth City and Pike's Peak Express Company, by their certain deed of release in like manner recorded in the said office and now of record in the office of the recorder of Arapahoe county, released, transferred, and conveyed unto the Central Overland, California and Pike's Peak Express Company, a corporation by that name, the lots 15 and 16 in block 14 aforesaid; and by divers other conveyances, in like manner recorded in the office of the recorder of said county of Arapahoe, the said premises and all the estate, right, title, and interest of the said Denver City Town Company and the said Central Overland, California and Pike's Peak Express Company, or each of them or either of them, at any time had in said premises, was and now is invested in the plaintiff, Richard E. Whitsitt.

Plaintiffs further show that until the assumption of the possession thereof by the plaintiffs as hereinafter mentioned the said premises and every part thereof were entirely vacant and unoccupied.

That by the certain act of Congress entitled An act for the relief of the citizens of Denver, in the Territory of Colorado, approved on the 28th day of May, A. D. 1864, the Congress of the United States enacted, among other things, that the provisions of the act of Congress for the relief of the citizens of towns on the lands of the United States under certain circumstances, approved May 3rd, 1844, should be so extended as to authorize the probate judge of Arapahoe county to enter, at the minimum price, in trust, for the several use and benefit of the rightful occupants of said lands and the *bona fide* owners of the improvements thereon, according to their respective interests, the said section 33 and the west half of
4 section 34 aforesaid, or such portions thereof as were settled and actually occupied for town purposes by the town of Denver aforesaid, and that in all respects, except as therein modified, the execution of the provisions of the said act should be

controlled by the provisions of the act of May 23rd, 1844, and the rules and regulations of the Commissioner of the General Land Office; that, in pursuance of said act of Congress, James Hall, Esq., then probate judge of the said county of Arapahoe, did, on the 6th day of May, A. D. 1865, enter at the Land Office of the United States in Denver aforesaid the before-described lands, and afterwards, and on or about the first day of July, A. D. 1868, the same were by letters patent granted to the said James Hall in his official capacity aforesaid; that the said James Hall, having conveyed away certain lots in the said town site to the occupants and owners of the improvements thereon, on or about the 16th day of March, A. D. 1867, his term of office as such probate judge having theretofore expired, released and conveyed to Omer O. Kent, Esq., his successor in said office, all the residue of the lots and lands in said town site not by him theretofore conveyed as aforesaid; and afterwards, and on or about the 31st day of August, 1867, the said Omer O. Kent, his term of office having expired, released and conveyed to Jacob Downing, Esq., his successor in said office, all the residue of the lots and premises in the said town site not by him or the said James Hall conveyed as aforesaid.

That on or about the 23rd day of September, A. D. 1869, the said Jacob Downing, his term of office as said probate judge having expired, conveyed and released unto Henry A. Clough, Esq., his successor in the said office, all the lots and premises in the said town site not by him, the said Jacob Downing, and his predecessors in the said office conveyed as aforesaid; and on or about the 22nd day of September, A. D. 1873, the said Henry A. Clough, his term of office as such probate judge having expired, released and conveyed to William C. Kingsley, Esquire, then probate judge and successor to the said Henry A. Clough, all the lots and premises in the said town site not by him, the said Henry A. Clough, and his predecessors in the said office conveyed as aforesaid; and on or about the 23rd day of September, A. D. 1875, the said William C. Kingsley, his term of office having then expired, released and conveyed unto Amos Steck, Esquire, his successor in the said office, all the lots and premises in the said town site not by him or the said William C. Kingsley and his predecessors in the said office conveyed as aforesaid.

Plaintiffs further show that immediately after the entry of the said lands as hereinbefore set forth the said James Hall, probate judge as aforesaid, gave public notice of such entry by posting such notice in three public places within the said town of Denver and by publishing the same in a newspaper printed and published in the county of Arapahoe, wherein the said town or city of Denver was then situated, and that on or about the 17th day of July, A. D. 1865, and within ninety days after the first publication of the said notice, one Ben. Holliday, who, the said plaintiffs show, was then and there entitled to the said premises, and by divers intermediate conveyances had acquired the legal estate therein and thereto from the said Leavenworth and Pike's Peak Express Company, signed a statement in writing containing an accurate description of the said before-

described lots and other lots, stating and setting forth the specific right, interest, and estate, to wit, an estate in fee, which he, the said Ben. Holliday, claimed to be entitled to receive, and delivered such statement to and into the office of the said probate judge.

Plaintiffs further show that afterwards and about the sixth day of March, A. D. 1868, one Edward Chase, falsely claiming and pretending that one Hamilton R. Hunt and Charles A. Cook, both since deceased, were at the date of the entry of said lands by the said probate judge the occupants of or the *bona fide* owners of the improvements upon the said lots, and claiming that the said Hunt and Cook had in like manner, within ninety days after the first publica-
6 tion of the notice aforesaid by the said probate judge, delivered to the said probate judge a statement in writing of their claim to the said premises, describing the same, applied to the said Jacob Downing; and although, as plaintiffs are informed and believe, neither the said Ben. Holliday nor the said Hunt and Cook, nor either of them, nor any person claiming under them or either of them, had instituted any action at law or in chancery to determine their conflicting claims in and to the said premises, and although no such determination had theretofore in any court been had, the said Jacob Downing, on such request of the said Edward Chase, without summoning the said Ben. Holliday or any person or persons claiming under or representing the said Ben. Holliday to make his or their proofs and allegations in reference to the claim of the said Ben. Holliday to the said lots adverse to the said Hunt and Cook, on or about that same sixth day of March, A. D. 1868, wrongfully and in violation of his duty in that behalf executed his deed conveying the said premises to the said Edward Chase.

Plaintiffs further show that afterwards and about the second day of January, A. D. 1869, the said Ben. Holliday, by his deed of that date, conveyed the said premises to the plaintiff, Richard E. Whitsitt, and to one John Hughes, and afterwards and on or about the 23rd day of October, A. D. 1861, the said John Hughes in like manner conveyed the said premises to the plaintiff, Richard E. Whitsitt; that afterwards and on or about the 17th day of April, A. D. 1878, the said Amos Steck, then still probate judge of the said county of Arapahoe, duly qualified and acting as such, by his certain deed of conveyance made in pursuance of the act of the General Assembly of the State of Colorado in such case made and provided, after reciting, among other things, that it had been made to appear to him, the said county judge, that the plaintiff, Richard E. Whitsitt, was the rightful owner of the said lots 15 and 16, in block 14, in the east division of the city of Denver, by a regular chain of title from the Denver Town Company, in consideration of the
7 premises in that said deed recited, and for a further consideration therein mentioned, granted and conveyed unto the said plaintiff the said lots 15 and 16, in block 14, aforesaid, in fee, and that on or about the 22nd day of April last past the plaintiff, Richard E. Whitsitt, leased and demised the said premises to the plaintiff, James Meskew, for the term of one year thence next following,

and delivered possession of the said premises to the said James Meskew.

And thereupon afterwards and, about that same time the said plaintiff, James Meskew, entered on and upon the said premises and erected thereon a certain dwelling-house or tenement of the value of one thousand dollars, or thereabouts.

Plaintiffs further show that the defendant, The Union Depot and Railroad Company, which, the plaintiffs show, is a corporation organized and existing under the laws of the State of Colorado, claiming to be invested by divers conveyances (with the particulars whereof the plaintiffs are unacquainted) with the pretended estate, right, and title so by the said Jacob Downing conveyed to the said Edward Chase, and the defendants, —— Taylor, —— Tobey, and James H. Place, The Denver, South Park and Pacific Railroad Company, Walter S. Cheesman and John W. Smith, combining and confederating with each other and with divers others to the plaintiffs unknown, but whom plaintiffs show are the servants of the said corporations, or one of them, and ready and willing to perform and carry out their unlawful purposes, have, at divers times since the erection of said house, threatened and still threaten to tear down and destroy the said house and oust the plaintiff, James Meskew, from the possession of the said premises; that the said companies, or one of them, have lately commenced to lay and construct in the neighborhood of the said house a railway track, which if continued, as the servants of the said companies, or one of them, engaged in the construction thereof have declared is their purpose to do, the same will pass through one corner of the said house, and plaintiffs fear and believe that, unless restrained by the writ of injunc-
8 tion, the said defendants before named, or their servants and employés acting at their instance in the premises, will speedily cause the said track to be built through the said house, and will destroy and tear down the said house, and the said companies are now under the direction of the said Tobey and the said Walter S. Cheesman with a large force of men and railway cars engaged in depositing upon the said premises large quantities of rock and stone, with the view and intention, as the plaintiffs believe, of rendering the said premises uninhabitable by the said James Meskew, and so as to prevent access by the said James Meskew to his house aforesaid.

Plaintiffs further aver that at the date of the conveyance of the said Jacob Downing, as probate judge as aforesaid, to the said Edward Chase the said Edward Chase was not nor at any time theretofore was he, nor any other person, possessed of the said lots or any part thereof, nor was the said Edward Chase, nor any person under or from whom the said Edward Chase derived or pretended to derive title, ever at any time in any manner the occupant of the said lots or either thereof nor the owner of any improvements whatsoever thereon, nor was he or any person under or from whom the said Chase derived title to the said lots or either thereof ever in any manner entitled thereto.

And the plaintiffs show, on information and belief, that the said

defendants claim that by virtue of the act of Congress aforesaid and the acts of the territorial Legislature of the State of Colorado in that behalf the deed of the said Jacob Downing to the said Edward Chase is conclusive evidence of title in the said Union Depot and Railroad Company, and that at the date of the entry of said lands the said Edward Chase, or those under whom he derived title, was the rightful occupant of the said lots or the *bona fide* owner of the improvements thereon, and that inasmuch as neither the said Richard E. Whitsitt nor the said Ben. Holliday, nor any of those
9 under whom the said Richard E. Whitsitt derives title to the said lots was at the date of said entry in possession or actual occupancy of the said lots or the owner of any improvements thereon, the said plaintiffs cannot be admitted to impeach the conveyance of the said Jacob Downing as probate judge, as aforesaid, to the said Edward Chase, or be heard to deny that the said Edward Chase was lawfully entitled to receive the same, whereas plaintiffs are advised by counsel, and aver and will claim at the final hearing hereof, that under and by virtue of the act of Congress hereinbefore mentioned, entitled "An act for the relief of the citizens of Denver, in the Territory of Colorado, approved May 28th, A. D. 1864," plaintiffs, by reason of the premises hereinbefore set forth, and by reason of such first actual occupancy of the said premises, are lawfully entitled thereto, and that the conveyance by the said Jacob Downing, assumed to be made to the said Edward Chase prior to any occupancy whatsoever of the said premises or the erection of any improvements thereon, was by reason that the said lots were then and always theretofore entirely vacant, unoccupied, and unimproved, and now is entirely void as against the plaintiffs, and that the said Union Depot and Railroad Company, as to any estate derived from the said Edward Chase in and to the said lots, hold the same as trustee for the said Richard E. Whitsitt.

And plaintiffs are advised by counsel, and therefore claim and contend, that according to the true intent and meaning of the said act of Congress, approved May 28th, A. D. 1864, the entry of said land by the said James Hall was in trust for the several use and benefit, not only of the then occupants of the said land and the *bona fide* owners of the improvements thereon, according to their respective interests and to the extent of their several and respective occupancy of and improvements upon the several lots in the said town site and no farther, but also in trust for those who might afterwards at any time become the first rightful occupants of any of the
10 lots in said town site at that time unoccupied, or the *bona fide* owners of the improvements on such lots according to their respective interests; all which claim and contention the plaintiffs show, on information and belief, is and will be denied by the said defendants.

And plaintiffs further show, on information and belief, that the said defendants will claim and contend that at some time long since the entry of said town site they or some of them or some of those under and from whom they derive title erected upon and around the said lots a certain fence, and that by reason thereof those erect-

ing such fence became and were the first occupants of the said lots and the *bona fide* owners of the improvements thereon, within the meaning of the act of Congress aforesaid approved May 28th, 1864, whereas the plaintiffs do and will claim and contend that the said lots were not, nor was either thereof, at any time prior to the entry therein of these plaintiffs and the erection thereon of the improvements hereinbefore mentioned, appropriated or devoted to any use whatever by any of the defendants then claiming or having title thereto, and that by reason of these last-mentioned premises, the erection of such fence, if any there was, by them or any of them so erected did not, within the meaning of the act of Congress approved May 28, 1864, aforesaid, constitute an occupancy of the said lots nor an improvement thereof. Wherefore the plaintiffs show that this is a controversy arising under the laws of the United States. Plaintiffs further show that the said premises so in controversy as aforesaid exceed in value the sum of five hundred —, and the improvements by the said James Meskew erected thereon and the right which the said James Meskew by the certain demise thereof hereinbefore set forth hath to occupy the said premises exceed and each thereof exceeds in value the sum of five hundred dollars.

Plaintiffs further show that the said Union Depot and Railroad Company hath lately assumed to convey the said lots in mortgage to one George W. Clayton and one David C. Dodge, as trustees.

11 To the end, therefore, that the said defendants, The Union Depot and Railroad Company, George W. Clayton, David C. Dodge, —— Taylor, whose first name is to the plaintiffs unknown; James H. Place, and one —— Tobey, whose first name is also to the plaintiffs unknown; the said Denver, South Park and Pacific Railroad Company, Walter S. Cheesman, — John W. Smith, may be summoned and made parties defendants hereunto, and required to answer this the plaintiffs' bill of complaint, but not on oath, their oaths and the oaths of each of them to their respective answers being hereby expressly waived, and that they and each of them, their agents, officers, tenants, and all claiming authority under them or either of them, may be strictly enjoined from intermeddling or interfering with the possession of the plaintiff, James Meskew, in and to the said premises, and from in any manner injuring, destroying, or tearing down the house and improvements of the said James Meskew erected upon the said premises, and that the said defendant, The Union Depot and Railroad Company, may be required to convey the said premises to the plaintiff, Richard E. Whitsitt, or that the plaintiffs may have such further relief or such other and different relief as to equity shall seem meet, may it please your honor to grant to your orators not only the most gracious writ of subpœna, under the seal of this honorable court, directed, etc., commanding, etc., but also the writ of injunction, under the seal of the court, directed to the said Union Depot and Railroad Company, George W. Clayton, David C. Dodge, —— Taylor, whose first name is to the plaintiffs unknown; James H. Place, and one —— Tobey, whose first name is also to the plaintiffs unknown; the said Denver, South Park and Pacific Railroad Company, Walter S. Cheesmen,

John W. Smith, David C. Dodge, George W. Clayton, and all and singular their agents, officers, servants, tenants, and all claiming authority under them or either of them, strictly enjoining and restraining them and every of them from interfering or intermeddling with the possession of the said defendant, James Meskew, in
12 the said premises, and from intruding into or upon the said lots or any part thereof, or destroying, damaging, or removing the said house and improvements of the said James Meskew on the said premises, or from inciting, encouraging, or suffering others so to do; and as in duty bound the plaintiffs shall ever pray.

(Signed) RICHARD E. WHITSITT.
(Signed) JAMES MESKEW.

(Signed) WELLS, SMITH & MACON,
Plaintiffs' Solicitors.

UNITED STATES OF AMERICA, *District of Colorado:*

Richard E. Whitsitt, being first duly sworn, saith on oath that he is one of the plaintiffs in the above-entitled bill of complaint; that he hath heard the same read and knows the contents thereof, and the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

(Signed) RICHARD E. WHITSITT.

Subscribed and sworn to before me this 5 day of May, A. D. 1880.
[SEAL.] (Signed) EDWARD F. BISHOP,
Clerk Dist. Court U. S.

Endorsed: No. 483. Circuit court. Richard E. Whitsitt and James Meskew *vs.* The Union Depot and Railroad Company *et al.* For an inj. and other relief. Filed May 5, 1880. (Signed) Edward F. Bishop, clerk.

13 And the said subpœna is in words and figures as follows, to wit:

Subpœna and Marshal's Return.

THE UNITED STATES OF AMERICA.

UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

The President of the United States of America to the Union Depot and Railroad Company, George W. Clayton, David C. Dodge, —— Taylor, James H. Place, —— Tobey, Denver, South Park and Pacific Railroad Company, Walter S. Cheesman, and John W. Smith, Greeting:

You and every of you are hereby commanded that you appear before the judges of the circuit court of the United States of America for the district of Colorado, at the city of Denver, in said district, on the first Monday in June next (it being the 7th day of June, A.

D. 1880), to answer the bill of complaint of Richard E. Whitsitt and James Meskew this day filed in the office of the clerk of said court, in said city of Denver, then and there to receive and abide by such judgment and decree as shall then or thereafter be had upon said bill of complaint, upon pain of judgment being pronounced against you by default and a decree had and entered accordingly.

To the marshal of the district of Colorado to execute and make due return.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, and the seal of the said circuit court for the district of Colorado, at the city of Denver aforesaid, this 5th day of May, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States the 104th year.

[Seal of Circuit Court.]

(Signed) EDWARD F. BISHOP, *Clerk.*

Memorandum.

The above-named defendants are hereby notified that unless they and each of them shall enter their appearance in the office of the
14 clerk of said court, at the city of Denver aforesaid, on or before the day to which the above writ is returnable the complainants' bill will be taken against them as confessed and a decree entered accordingly.

(Signed) EDWARD F. BISHOP, *Clerk.*

Marshal's Return.

DISTRICT OF COLORADO, *ss:*

DENVER, *May* 18*th*, *A. D.* 1880.

I have duly executed the within writ by personally delivering a certified copy to the within-named defendants, to wit, Walter S. Cheesman and William Tobey, May 6th, A. D. 1880; James H. Place and John W. Smith, May 7th, A. D. 1880; also served the Union Depot and Railroad Company by delivering a certified copy of the within to Walter S. Cheesman, president of the said Union Depot and Railroad Company, at Denver, Arapahoe county, Colorado, on the 7th day of May, A. D. 1880; also served the Denver, South Park, and Pacific Railroad Company by personally delivering a certified copy of the within to Walter S. Cheesman, vice-president of said Denver, South Park and Pacific Railroad Company, at Denver on the 8th day of May, A. D. 1880; also served David C. Dodge and George W. Clayton by delivering a certified copy of the within to each of them, at Denver, Arapahoe county, Colorado, on the 10th day of May, A. D. 1880; also served Wm. E. Taylor by personally delivering a certified copy of the within to him, at Denver, Arapahoe county, Colorado, May 18th, 1880; all of the above-named defend-

ants served at Denver, Arapahoe county, Colorado, on the above-mentioned dates.

(Signed) P. P. WILCOX, *Marshal*,
By SIM. W. CANTRIL,
Deputy Marshal.

15 Endorsed: Gen. No. 483. Circuit court of the United States for the district of Colorado. In chancery. Richard E. Whitsitt and James Meskew *vs.* The Union Depot and Railroad Company, George W. Clayton, *et al.* Subpœna. Returnable to rule day, first Monday in June, A. D. 1880. Filed this 18th day of May, A. D. 1880. (Signed) Edward F. Bishop, clerk, by F. W. Tupper, deputy clerk. Wells, Smith, and Macon, of Denver, compl'ts' sol'rs.

And afterward and on the same day, to wit., the 5th day of May, A. D. 1880, the same being one of the regular juridical days of the May term, A. D. 1880, of said court—present, the Honorable Moses Hallett, district judge—the following proceeding was had and entered of record in said court and in said cause, to wit:

Order. Petition for Injunction Denied.

Richard E. Whitsitt and James Meskew *vs.* Union Depot and Railroad Company, George W. Clayton, David C. Dodge, —— Taylor, James H. Place, —— Tobey, The Denver, South Park and Pacific Railroad Company, Walter S. Cheesman, and John W. Smith.	In Chancery.

For an injunction and other relief.

At this day come the said complainants, by E. L. Smith,
16 Esq., their solicitor—

And the prayer of the said complainants for an injunction herein having been submitted and taken under advisement by the court, and the court being now sufficiently advised in the premises:

It is ordered by the court, for good and sufficient reasons to the court appearing, that the said petition be denied.

And afterwards and on, to wit, the 3rd day of July, A. D. 1880, came the said defendants, by Messrs. B. M. and C. J. Hughes, their solicitors, and filed in said court and in said cause their demurrer to the bill heretofore filed herein; and the said demurrer is in words and figures as follows, to wit:

Demurrer to Bill.

UNITED STATES OF AMERICA, } ss:
District of Colorado. }

In the Circuit Court of the United States for the District of Colorado, A. D. 1880. In Chancery.

RICHARD E. WHITSITT and JAMES MESKEW, Plaintiffs,

vs.

THE UNION DEPOT AND RAILROAD COMPANY, THE DENVER, SOUTH PARK, and Pacific Railroad Company, George W. Clayton, David C. Dodge, W. E. Taylor, James W. Place, —— Tobey, Walter S. Cheesman, John W. Smith, Defendants.

The demurrer of the defendants to the bill of complaint of Richard E. Whitsitt and James Meskew, the complainants.

The defendants, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint contained to be true in such manner and form as the same
17 are therein and thereby set forth and alleged, demur to said bill and, for several causes of demurrer, do*th* now here show:

1st. That the complainants have not in and by their said bill made or stated such a case as entitles them in a court of equity to any relief from or against the defendants, any or either of them, touching the matters contained in said bill or any of such matters.

2nd. That the complainants have not, as appears by their said bill, made out any title to the relief thereby prayed.

3rd. That the said bill of complaint does not show therein that the subject-matter of said complaint is a controversy arising under the laws of the United States.

4th. That it appears by the said bill that if there is any controversy between the complainants and the defendants or any or either of defendants the same exists under the laws and statutes of the State of Colorado, which said controversy, if any at all, is within the jurisdiction wholly of the courts of that State.

5th. That the said bill of complaint of the complainants shows therein that the complainant, the said Whitsitt, never had nor has any right or title of any nature whatever to the lots mentioned in said bill, to wit, lots 15 and 16, in block 14, in the east division of Denver city, nor any interest therein, and that he never had and has no right to institute or bring his said bill of complaint in regard to the said lots or either of them against these defendants or any or either of them, and that the said Meskew, his alleged tenant, did never have nor has any right, title, or interest whatever in the same lots or either of them, and has no right and never had any right to institute or bring any bill of complaint in regard to said lots or either of them against the defendants or any or either of them.

6th. That the claim to said lots or real property in said bill mentioned set up by the complainant, the said Richard E. Whit-
18 sitt, is, as appears by the said bill, wholly without the sanction or warrant of any law of the United States of America.

7th. That it appears by the said bill of complaint that the Union Depot and Railroad Company did acquire the legal title to said lots fifteen and sixteen, in block 14, in the east division of Denver, a long time before the filing of the said bill in this court, through a deed from the probate judge of Arapahoe county (then in the Territory of Colorado, which is known now as the State of Colorado), and this prior in time to the pretended deed of a probate judge of the same county issued to the said complainant, Richard E. Whitsitt, as said bill shows, many years after the said deed was issued under which the said Union Depot and Railroad Company claims its title to said lots.

8th. That it appears by the said bill of complaint that the said Richard E. Whitsitt and his pretended tenant, the said James Meskew, are trespassers upon the said lots, and as such are not entitled to any hearing or consideration in a court of equity.

9th. That it appears by the said bill of complaint that the said George W. Clayton and David C. Dodge became entitled to a lien on said lots and each of them before the filing of the said bill of complaint without any notice whatever of any claim upon or to the same by the said Richard E. Whitsitt, and hold the same in good faith, and for a valuable consideration, without any such notice.

10th. That the said bill of complaint shows therein that the said complainant, the said Richard E. Whitsitt, has, for a period of twelve years, acquiesced in the assertion of adverse rights to said lots in said complaint described and claimed now here by him; that he has been guilty of gross neglect in prosecuting his pretended claim to same, and is not now entitled, after such lapse of time, to the relief he claims or any relief whatever from or against these defendants, or any or either of them, in a court of equity.

(Signed) By WILLARD TELLER AND
B. M. AND C. J. HUGHES,
19 *Solicitors for Defendants.*

We certify that, in our opinion, the foregoing demurrer of the above-named defendants to the bill of complaint of the said Richard E. Whitsitt and James Meskew, complainants, is well founded in law and proper to be filed in the above-entitled cause.

(Signed) WILLARD TELLER,
B. M. AND C. J. HUGHES,
Solicitors for Defendants.

UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

Walter S. Cheesman, one of the defendants above named, on oath states that he has heard read the foregoing demurrer to the bill of complaint of Richard E. Whitsitt and James Meskew in the above-entitled cause, and that the same is not interposed for the purpose of delaying said suit or any proceeding therein.

(Signed) WALTER S. CHEESMAN.

Subscribed and sworn to before me this 1st day of July, A. D. 1880.

[Seal of District Court.]

(Signed) EDWARD F. BISHOP,
Clerk Dist. Court, U. S.

Endorsed: No. 483. In the U. S. circuit court, district of Colorado, A. D. 1880. In chancery. Rich'd E. Whitsitt & James Meskew, pl'ffs, *vs.* The Union Depot & R. R. Co., The Denver, South P. & P. R. R. Co., W. S. Cheesman, Geo. W. Clayton, D. C. Dodge, W. S. Taylor, *et al.*, def'ts. Demurrer of defendants to bill of complaint. Filed July 3, 1880. (Signed) Edward F. Bishop, clerk. Willard Teller, B. M. & C. J. Hughes, sol'rs for def'ts.

20 And afterwards and on, to wit, the 6th day of October, A. D. 1880, the same being one of the regular juridical days of the October term, A. D. 1880, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order. Demurrer to Bill Sustained. Bill Dismissed. Appeal Allowed.

RICHARD E. WHITSITT and JAMES MESKEW
vs.
THE UNION DEPOT AND RAILROAD COMPANY, —— Taylor, —— Tobey, James H. Place, George W. Clayton, David C. Dodge, The Denver, South Park and Pacific Railroad Company, Walter S. Cheesman, and John W. Smith. } In Chancery.

For an injunction and other relief.

At this day come the said complainants, by Thomas Macon, Esq., their solicitor, and the said defendants, by Willard Teller, Esq., their solicitor, also come.

And the demurrer of the said defendants to the bill of complaint herein coming on now to be heard is argued by counsel, and the court being now sufficiently advised in the premises, it seemeth to the court here that the said bill of complaint is not sufficient in law for the said defendants to answer unto, and the demurrer is sustained.

And thereupon the said plaintiffs say that they will abide by their bill of complaint. Wherefore it is considered by the court that the said bill of complaint stand dismissed at the cost of the said complainants, to be taxed.

And thereupon the said complainants pray an appeal from the decree of dismissal aforesaid to the Supreme Court, which is allowed them upon condition, nevertheless, that they file herein their
21 bond on said appeal in the sum of five hundred (500) dollars, conditioned according to law, and with surety, to be approved by a judge of this court.

And afterwards and on, to wit, the 7th day of October, A. D. 1880, came again the said complainants, by their solicitors aforesaid, and filed in said court and in said cause their bond on appeal to the Supreme Court of the United States, and the said bond is in words and figures as follows, to wit:

Bond on Appeal.

THE UNITED STATES OF AMERICA, *District of Colorado:*

Know all men by these presents that we, Richard E. Whitsitt and James Meskew, as principals, and Alfred H. Miles, as surety, are held and firmly bound unto the Union Depot and Railroad Company, the Denver, South Park and Pacific Railroad Company, George W. Clayton, David C. Dodge, W. E. Taylor, James W. Place, —— Tobey, Walter S. Cheesman, John W. Smith, in the full and just sum of five hundred dollars, to be paid to the said The Union Depot and Railroad Company, the Denver, South Park and Pacific Railroad Company, George W. Clayton, David C. Dodge, W. E. Taylor, James W. Place, —— Tobey, Walter S. Cheesman, John W. Smith; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 7th day of October, in the year of our Lord one thousand eight hundred and eighty.

Whereas lately at the October term, A. D. 1880, of the circuit court of the United States for the district of Colorado, in a bill in equity pending in said court between said Richard E. Whitsitt, James Meskew, plaintiffs, and the Union Depot and Railroad Company, the Denver, South Park and Pacific Railroad Company, George W. Clayton, David C. Dodge, W. E. Taylor, James W. Place, —— Tobey, Walter S. Cheesman, John W. Smith, defendants, a decree was rendered against the said Richard E Whitsitt and
22 James Meskew, dismissing their bill of complaint, and the said Richard E. Whitsitt and James Meskew having prayed and been allowed appeal to the Supreme Court to reverse the judgment in the aforesaid suit, and a citation directed to the said prayers above named, citing and admonishing them to be and appear at a Supreme Court of the United States to be held at Washington on the 2nd Monday of October instant:

Now the condition of the above obligation is such that if the said Richard E. Whitsitt and James Meskew shall prosecute said writ to effect and answer all damages and costs if they fail to make good their plea, then the above obligation to be void; else to remain in full force and virtue.

(Signed)	RICHARD H. WHITSITT.	[SEAL.]
(Signed)	JAMES MESKEW.	[SEAL.]
(Signed)	ALFRED H. MILES.	[SEAL.]

Approved:
MOSES HALLETT,
District Judge.

Endorsed: Gen. No. 483. Circuit court of the United States, district of Colorado. Richard E. Whitsitt, James Meskew, plaintiffs in error, *vs.* The Union Depot and Railroad Company *et als.* Appeal bond, $500. Filed in the circuit court U. S. this 7 day of Oct., A. D. 1880. (Signed) Edward F. Bishop, clerk.

23 And afterwards and on, to wit, the 20th day of July, A. D. 1880, came Emma C. Whitsitt, by Messrs. Wells, Smith, and Macon, her solicitors, and filed in said court and in said cause her petition to be substituted as complainant herein, and the said petition is in words and figures as follows, to wit:

Petition for Substitution.

THE UNITED STATES OF AMERICA, *District of Colorado:*

In the Circuit Court of the United States for the District of Colorado.
In Equity.

RICHARD E. WHITSITT, JAMES MESKEW
vs.
THE UNION DEPOT AND RAILROAD COMPANY *et als.* } No. 483.

The petition of Emma C. Whitsitt respectively represents to this honorable court that since the final decree given herein, whereby the bill of complaint of the said Richard and James was dismissed, the said Richard departed this life testate, leaving as his sole heir-at-law your petitioner.

That the last will and testament of the said Richard E. Whitsitt hath been duly admitted to probate in the county court of Arapahoe county, in the State of Colorado, which your petitioner shows was the county of the residence of the said Richard E. Whitsitt at the time of his death, and long before that; that a copy of said will, duly certified by the clerk of said county court, is hereto attached.

By the terms of the said last will and testament your petitioner is made the sole devisee of the said Richard E. Whitsitt.

Wherefore your petitioner prays leave, as the sole heir and
24 devisee of said decedent, to become party herein, and to be allowed an appeal from the decree aforesaid of this honorable court to the Supreme Court, either jointly with the said James Meskew, or, if he shall decline, to unite therein with your petitioner severally, in her own name and behalf; and as in duty bound your petitioner will ever pray, &c.

(Signed) EMMA C. WHITSITT.

(Signed) E. T. WELLS,
E. L. SMITH,
THOS. MACON,
Petitioner's Sol'rs.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

Emma C. Whitsitt, being first duly sworn, says on oath that she is the petitioner in the foregoing petition; she has heard the same read and knows the contents thereof, and the same is true of her own knowledge.

(Signed) EMMA C. WHITSITT.

Subscribed and sworn to before the undersigned, a notary public in and for the county of Arapahoe, in the State of Colorado, at said county of Arapahoe, this July 18th, A. D. 1881.

[Seal of Notary Public.]

(Signed) JOHN H. CLARK,
Notary Public.

UNITED STATES OF AMERICA, } ss:
State of Colorado, Arapahoe County, }

In County Court. May Term, A. D. 1881.

Pleas before the Honorable Benj. F. Harrington, judge of the county court in the second judicial district of the State of Colorado, and at a term thereof begun and held at the court-house in the city of Denver, in said county, on the first Monday (being the second day) of May, in the year of our Lord one thousand eight hundred and eighty-one, and of the Independence of the United States the one hundred and fifth.

25 Present: Honorable Benj. F. Harrington, judge; Michael Spangler, sheriff.

Attest: R. M. STEELE, *Clerk.*

Being of sound mind and disposing memory and realizing the uncertainty of life and the certainty of death, I, Richard E. Whitsitt, do devise, ordain, and establish the following as my last will and testament:

Article 1st. It is my will and desire that my friends after my death shall have my mortal remains interred according to the forms of Christian burial.

Article 2nd. It is my will, and is hereby directed, that my necessary funeral expenses shall first be paid by the executors that are hereinafter appointed of this my last will and testament of any monies properly coming into their hands as such from my estate; and, secondly, that all other just debts owing by me shall be paid by my executors as fast as they can obtain the money to discharge the same by the collection of the debts owing to my estate and by the sale of any property belonging to my estate as fast as the sale of said property can be effected with due regard to the proper administration of my estate.

Article 3rd. It is further my will and desire, and I hereby direct, that after all my just debts shall have been paid and discharged, as directed in the second article of my will, *that* the remainder of my property, if any, belonging to my estate, of every and all kinds

whatsoever, shall go to and be the absolute property of my beloved wife, Emma C. Whitsitt, and that she shall have full and complete control and ownership, to do with and dispose of the same as she may deem for her best interest, having confidence that she will act prudently with any property that may so come to her possession.

Article 4th. It is further my will and desire, and I hereby appoint and authorize Alfred H. Miles, David A. Chever, and Moses Hallett my executors of this my last will and testament, having full confidence in their honesty and ability, believing that they
26 will honestly administer this my last will and testament as above directed.

In testimony whereof I have hereunto affixed my name and seal in the presence of George F. Crocker, J. Bright Smith, and Fox Diefendorf, and subscribing witnesses thereto, at my request, this twentieth, 20th, day of June, A. D. one thousand eight hundred and sixty-seven, 1867, at the city of Denver, Colorado Territory.

RICHARD E. WHITSITT. [SEAL.]

Witnessed by—
GEORGE F. CROCKER.
FOX DIEFENDORF.
J. BRIGHT SMITH.

The words Amos Steck erased and the words Alfred H. Miles written over or above said name.

Done by me this 3rd day of December, A. D. 1868.

Denver, December 3rd, 1868.

RICHARD E. WHITSITT.

Witness:
JOHN F. BOSTWICK.

In the Matter of the Probate of the Last Will and Testament of RICHARD E. WHITSITT, Deceased.

On this day comes Emma C. Whitsitt, widow of the said Richard E. Whitsitt, deceased, in person, and by Amos Steck, Esq., her attorney, and in open court moves that the paper writing heretofore and on the 21st day of April, A. D. 1881, presented in this court for probate by Alfred H. Miles, purporting to be the last will and testament of the said Richard E. Whitsitt, deceased, be now admitted to probate and record in this court as the true last will and testament of the said Richard E. Whitsitt, deceased. And it appearing to the court that the said Emma C. Whitsitt is the sole heir-at-law of the said deceased, and that she is also the sole legatee and devisee named in said writing; that Alfred H. Miles, David A. Chever, Moses Hallett, and Amos Steck, the persons named in said writing as executors thereof, have each and all declined to act as executors thereof; that due proof of the death of George F. Crocker and Fox
27 Diefendorf, two of the subscribing witnesses to said instrument of writing, and of their signatures to said instrument, has — heretofore made and filed in this court, and that the dedimus

heretofore issued out of this court to prove said writing and directed to Jno. G. L. Brownell, alderman of the city of Reading, in the county of Bucks and State of Pennsylvania, has been returned and filed in this court; and it appearing from an inspection thereof that the testimony of J. Bright Smith, one of the subscribing witnesses to said instrument, was, by the said Jno. G. L. Brownell, on the 20th day of May, A. D. 1881, duly taken and reduced to writing; and it appearing to the court therefrom that the said witness, J. Bright Smith, has testified to the due execution of the said last will and testament, according to law, by the testator, the said Richard E. Whitsitt, deceased, and that at the time of the execution of said instrument, the testator, the said Richard E. Whitsitt, deceased, was of sound mind and memory and under no constraint; that he subscribed his name thereto as attesting witness at the request of and in the presence of the said testator and in the presence of the said Fox Diefendorf and George F. Crocker, and that they all saw the said Richard E. Whitsitt sign said writing, which testimony, together with the testimony touching the death and signatures of the said George F. Crocker and Fox Diefendorf heretofore and on the 14th instant taken and filed herein, is hereby ordered to be entered of record; and the court being now fully advised in the premises: It is ordered that the said instrument be, and the same is hereby, declared to be duly and sufficiently proven and authenticated as the last will and testament of the said Richard E. Whitsitt, deceased.

It is further ordered that the said will be entered of record, and that letters testamentary or of administration may issue thereon.

I, R. M. Steele, clerk of the county court of Arapahoe county, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete copy of the last will and testa-
28 ment of Richard E. Whitsitt, deceased, and the order admitting the same to probate, as appears from the records of my office.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Denver, this 13th day of July, A. D. 1881.

[Seal of County Court.]

(Signed) R. M. STEELE, *Clerk.*

Endorsed: C. C. No. 483. Richard E. Whitsitt *et als. vs.* The Union Depot and Railroad Company *et als.* Petition of Emma C. Whitsitt for substitution. Filed Jul. 20, 1881. (Signed) Edward F. Bishop, clerk.

And afterwards and on the same day, to wit, the 20th day of July, A. D. 1881, the same being one of the regular juridical days of the May term, A. D. 1881, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order. Emma C. Whitsitt Substituted as Complainant in Lieu of Richard E. Whitsitt.

RICHARD E. WHITSITT and JAMES MESKEW
vs.
THE UNION DEPOT AND RAILROAD COMPANY *et als.*

For an injunction and other relief.

At this day comes Emma C. Whitsitt and represents to the court here that since the final decree herein the said Richard E. Whitsitt hath departed this life, leaving her as sole heir-at-law; that
29 the will of said Richard E. Whitsitt, deceased, hath been duly proved in the county court of Arapahoe county, whereby all the estate, real and personal, of the said Richard E. Whitsitt is devised to the said petitioner.

Ordered by the court, That the said petitioner be substituted herein as party hereto, in lieu of said Richard E. Whitsitt, as his devisee and heir-at-law.

And afterwards and on, to wit, the 10th day of August, A. D. 1881, came again the said complainant, Emma C. Whitsitt, by her solicitors aforesaid, and filed in said court and in said cause a certain mandate from the Supreme Court of the United States; and the said mandate is in words and figures as follows, to wit:

Mandate Dismissing Appeal.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Colorado, Greeting:

Whereas lately, in the circuit court of the United States for the district of Colorado, before you or some of you, in a cause between Richard E. Whitsitt and James Meskew, complainants, and The Union Depot and Railroad Company, The Denver, South Park and Pacific Railroad Company, George W. Clayton, David C. Dodge, W. E. Taylor, James W. Place, —— Tobey, Walter S. Cheesman, and John W. Smith, defendants, wherein the decree of the said circuit court, entered in said cause on the 6th day of October, A. D. 1880, was in favor of the said defendants, The Union Depot and Railroad Company *et al.*, and against the said complainants, as by the inspection of the transcript of the record of the said circuit court, which was brought into the Supreme Court of the United States by virtue of an appeal, agreeably to the act of Congress in such case
30 made and provided, fully and at large appears; and

Whereas in the present term of October, in the year of our Lord one thousand eight hundred and eighty, the said cause came on to be heard before the said Supreme Court on the said transcript of record, and was argued by counsel: On consideration whereof, it is now here ordered, adjudged, and decreed by this court that this appeal be, and the same is hereby, dismissed for the want of jurisdiction.

17TH JANUARY, 1881.

You, therefore, are hereby commanded that such proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Morrison R. Waite, Chief Justice of said Supreme Court, the fifth day of August, in the year of our Lord one thousand eight hundred and eighty-one.

[Seal of Supreme Court.]

Taxed by—

(Signed) JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Endorsed. 483. No. 1070. October term, 1880. Mandate Supreme Court United States. Whitsitt and Meskew *vs.* Union Depot and Railroad Company *et al.* Filed Aug. 10, 1881. (Signed) Edward F. Bishop, clerk.

And afterwards and on, to wit, the 30th day of August, A. D. 1881, came again the said complainant, Emma C. Whitsitt, by her solicitors aforesaid, and filed in said court and in said cause
31 an affidavit as to value of property in controversy, a notice to James Meskew to join in appeal, and a bond in appeal to the Supreme Court of the United States; and the said affidavit is in words and figures as follows, to wit:

Affidavit as to Value.

THE UNITED STATES OF NORTH AMERICA,
District of Colorado:

In the Circuit Court of the United States. In Equity.

EMMA C. WHITSITT, JAMES MESKEW
vs.
THE UNION DEPOT AND RAILROAD COMPANY.

Alfred H. Miles, being first duly sworn, says, on oath, that he resides at the city of Denver, in the county of Arapahoe and State of Colorado, and hath resided at said city for twenty years last past and more; that he is well acquainted with lots fifteen (15) and sixteen (16), in block fourteen (14), in the east division of the city of Denver aforesaid, and with the value thereof, and hath been so acquainted with the value of said premises at all times for twenty years last past and more; and deponent saith that on the sixth day of October, A. D. 1880, the said lots were exceeding in value, and ever since have exceeded in value, the sum of five thousand dollars.

(Signed) ALFRED H. MILES.

Subscribed and sworn to before me this Aug. 23rd, A. D. 1881.

[NOTARIAL SEAL.] (Signed) WILLIAM H. JORDAN,
Notary Public.

32 Endorsed: C. C. 483. Emma C. Whitsitt *et al. vs.* The Union Depot & R. R. Co. *et al.* Affidavit as to value. Filed Aug. 30, 1881. (Signed) Edward F. Bishop, clerk.

And the said notice to join in appeal is in words and figures as follows, to wit:

To James Meskew, Esq., Denver, Col.:

Having been substituted by order of the circuit court of the United States for the district of Colorado as party (in lieu of the late Richard E. Whitsitt, deceased) in the certain suit in equity lately pending therein between the said Richard E. Whitsitt and you, James Meskew, of the city of Denver, in said district, as plaintiffs, and the Union Depot and Railroad Company, —— Taylor, —— Tobey, James H. Place, George W. Clayton, David C. Dodge, the Denver, South Park, and Pacific Railroad Company, Walter S. Cheeseman, and John W. Smith as defendants, I desire to appeal from the decree given in said cause at the October term, A. D. 1880, of said court to the Supreme Court of the United States, and I respectfully request you to unite with me in said appeal.

Denver, Colo., Aug. 22, 1881.

Very respectfully, your obedient servant,

EMMA C. WHITSITT.

(Signed) E. T. WELLS,
E. L. SMITH,
THOMAS MACON,
Sol'rs for Appellants.

I have this day received a copy of the within notice, and hereby decline to join in the appeal referred to or to enter into the
33 bond therein.

Denver, August 22, A. D. 1881.

(Signed) JAMES MESKEW.

THE UNITED STATES OF AMERICA, *District of Colorado:*

In the Circuit Court of the United States for said District. In Equity.

EMMA C. WHITSITT, Sole Devisee and Heir-at-Law of Richard E. Whitsitt, Deceased, and JAMES MESKEW

vs.

THE UNION DEPOT AND RAILROAD COMPANY *et al.*

Ebenezer T. Wells, being first duly sworn, says on oath that on this 23rd day of August, A. D. 1881, he saw the above-named defendant, James Meskew, subscribe the endorsement upon the foregoing notice. Deponent knows as a matter of fact that said James Meskew had, on the day of the date thereof, received a copy of said notice, and then and there declined to unite on said appeal.

(Signed) EBENEZER T. WELLS.

Subscribed and sworn to before me this August 23, A. D. 1881.

[Seal of District Court.]

(Signed) EDWARD F. BISHOP,
Clerk Dist. Court U. S.,
By WM. E. ROGERS, *Deputy.*

Endorsed: C. C. 483. Emma C. Whitsitt *vs.* Union Depot & R. R. Co. *et al.* No. to James Meskew to unite in appeal & proof of refusal. Filed Aug. 30, 1881. (Signed) Edward F. Bishop, clerk.

34 And the said bond on appeal is in words and figures as follows, to wit:

THE UNITED STATES OF AMERICA, *District of Colorado:*

Know all men by these presents that we, Emma C. Whitsitt and James Meskew, as principals, and Alfred H. Miles — Ebenezer T. Wells, as surety, are held and firmly bound unto the Union Depot and Railroad Company, —— Taylor, —— Tobey, James H. Place, George W. Clayton, David C. Dodge, the Denver, South Park and Pacific Railroad Company, Walter S. Cheesman, — John W. Smith in the full and just sum of five hundred dollars, to be paid to the said The Union Depot and Railroad Company, Taylor, Tobey, Place, Clayton, Dodge, Cheesman, and Smith and the Denver, South Park and Pacific Railroad Company; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this — day of ——, in the year of our Lord one thousand eight hundred and eighty-one.

Whereas lately at the October term, A. D. 1880, of the circuit court of the United States for the district of Colorado, in a suit pending in said court between Richard E. Whitsitt, since deceased, and who died leaving the said Emma C. Whitsitt as his sole devisee and heir-at-law, and the said James Meskew, as plaintiffs, and the said Union Depot and Railroad Company, Tobey, Taylor, Clayton, Dodge, Place, Cheesman, — Smith and said The Denver, South Park and Pacific Railroad Company, defendants, a decree was rendered against the said Richard E. Whitsitt and James Meskew, dismissing their certain bill of complaint in that cause; and whereas the said Emma C. Whitsitt hath, by the order of the said circuit court, been substituted in said cause in the stead of said Richard E. Whitsitt, and the said Emma C. Whitsitt having prayed and been allowed an appeal from the decree aforesaid in the aforesaid suit and a citation directed to the said The Union Depot and Railroad Company,
35 Taylor, Tobey, Dodge, Clayton, Smith, — Place and the Denver, South Park and Pacific Railroad Company, citing and admonishing them to be and appear at a Supreme Court of the United States to be held at Washington on the 2nd Monday of October next:

Now, the condition of the above obligation is such that if the said Emma C. Whitsitt shall prosecute said appeal to effect and answer

all costs if she fail to make good her plea, then the above obligation to be void; else to remain in full force and virtue.

(Signed) EMMA C. WHITSITT. [SEAL.]
(Signed) ALFRED H. MILES. [SEAL.]
(Signed) EBENEZER T. WELLS. [SEAL.]

Approved:
(Signed) GEORGE W. McCRARY,
Circuit Judge.

Justification.

THE UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

Alfred H. Miles and Ebenezer T. Wells, sureties on the within bond, being each first duly sworn, depose and say that they are each worth in cash the sum below set opposite their names, respectively—that is to say, as to said Alfred H. Miles, one hundred thousand dollars; as to Ebenezer T. Wells, one thousand dollars—over and above all their just debts and liabilities and in property subject to levy and sale upon execution.

(Signed) EBENEZER T. WELLS.
(Signed) ALFRED H. MILES.

Subscribed and sworn to before me, at Denver, this 22nd day of August, A. D. 1881.

[NOTARIAL SEAL.] (Signed) ISAAC THOMAS,
Notary Public.

36 Endorsed: Gen. No. 483. Circuit court of the United States, district of Colorado. Emma C. Whitsitt *et al.*, plaintiffs in error, *vs.* Union Depot & Railroad Co. *et al.* Appeal bond, $500.00. Filed in the circuit court U. S. this 30 day of Aug., A. D. 1881. (Signed) Edward F. Bishop, clerk.

And afterwards and on, to wit, the 9th day of September, A. D. 1884, there was filed in said court and in said cause a certain mandate from the Supreme Court of the United States, and the said mandate is in words and figures as follows, to wit:

Mandate Dismissing Appeal.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Colorado, Greeting:

Whereas lately in the circuit court of the United States for the district of Colorado, before you or some of you, in a cause between Emma C. Whitsitt, sole devisee and heir-at-law of Richard E. Whitsitt, deceased, and James Meskew, complainants, and the Union Depot and Railroad Company, the Denver, South Park and Pacific

Railroad Company, George W. Clayton, *et al.*, defendants,
37 wherein the decree of the said circuit court entered in said cause on the 6th day of October, A. D. 1880, was in favor of the said defendants, The Union Depot and Railroad Company *et al.*, and against the said complainants, as by the inspection of the transcript of the record of the said circuit court, which was brought into the Supreme Court of the United States by virtue of an appeal taken by Emma C. Whitsitt, sole devisee and heir-at-law of Richard E. Whitsitt, deceased, agreeably to the act of Congress in such case made and provided, fully and at large appears;

And whereas in the present term of October, in the year of our Lord one thousand eight hundred and eighty-three, the said cause came on to be heard before the said Supreme Court on the said transcript of record, and the appellant having been three times solemnly called by the marshal to come into court and prosecute her appeal, and failing to appear, it is thereupon, in pursuance of the 16th rule of this Court, and on the motion of Mr. Samuel Shellabarger, of counsel for the appellees, now here ordered, adjudged, and decreed by this Court that this cause be, and the same is hereby, dismissed with costs; and that the said defendants, The Union Depot and Railroad Company *et al.*, recover against the said Emma C. Whitsitt, sole devisee and heir-at-law of Richard E. Whitsitt, deceased, for their costs herein expended and have execution therefor.

And it is further ordered that this cause be, and the same is hereby, remanded to the said circuit court to be proceeded in according to law and justice.

4TH APRIL, 1884.

You therefore are hereby commanded that such execution and proceedings be had in said cause as, according to right and justice and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Morrison R. Waite, Chief Justice of said Supreme Court, the fifth day of September, in the year of our Lord, one thousand eight hundred eighty-four.

[Seal of Supreme Court.]

Taxed by—
(Signed)

JAMES H. McKENNEY,
38 *Clerk of the Supreme Court of the United States.*

Endorsed: No. 483. No. 303. October term, 1883. Mandate. Supreme Court United States. Whitsitt, sole devisee and heir, &c., *vs.* Union Depot and Railroad Co. *et al.* Filed Sep. 9, 1884. (Signed) Edward F. Bishop, clerk.

And afterwards and on, to wit, the 10th day of September, A. D. 1884, came again the said complainant, by her solicitors aforesaid, and filed in said court and in said cause her bond on appeal and sued out of said court a citation to the Supreme Court of the United States, and the said bond is in words and figures as follows, to wit:

Bond on Appeal.

THE UNITED STATES OF AMERICA, *District of Colorado:*

Know all men by these presents that we, Emma C. Whitsitt and James Meskew, as principals, and Alfred H. Miles, Ebenezer T. Wells, as surety, are held and firmly bound unto the Union Depot and Railroad Company, —— Taylor, —— Tobey, James H. Place, George W. Clayton, David C. Dodge, the Denver, South Park, and Pacific Railroad Company, Walter S. Cheesman, John W. Smith, in the full and just sum of five hundred dollars, to be paid to the said Union Depot and Railroad Company, Taylor, Tobey, Place, Clayton, Dodge, Cheesman, and Smith and the Denver, South Park, and Pacific Railroad Company; to which payment, well and truly
39 to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 30th day of August, in the year of our Lord one thousand eight hundred and eighty-four.

Whereas lately at the October term, A. D. 1880, of the circuit court of the United States for the district of Colorado, in a suit pending in said court between Richard E. Whitsitt, since deceased, and who died leaving the said Emma C. Whitsitt as his sole devisee and heir-at-law, and the said James Meskew, as plaintiffs, and the said Union Depot and Railroad Company, Tobey, Taylor, Clayton, Dodge, Place, Cheesman, Smith, and said The Denver, South Park and Pacific Railroad Company, defendants, a decree was rendered against the said Richard E. Whitsitt and James Meskew, dismissing their certain bill of complaint in that cause; and whereas the said Emma C. Whitsitt hath by the order of the said circuit court been substituted in said cause in the stead of said Richard E. Whitsitt, and the said Emma C. Whitsitt having prayed and been allowed an appeal from the decree aforesaid in the aforesaid suit, and a citation directed to the said The Union Depot and Railroad Company, Taylor, Tobey, Dodge, Clayton, Smith, Place, and the Denver, South Park and Pacific Railroad Company, citing and admonishing them to be and appear at a Supreme Court of the United States to be held at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said Emma C. Whitsitt shall prosecute said appeal to effect and answer all costs if she fail to make good her plea, then the above obligation to be void; else to remain in full force and virtue.

(Signed) EMMA C. WHITSITT. [SEAL.]
(Signed) ALFRED H. MILES. [SEAL.]
(Signed) EBENEZER T. WELLS. [SEAL.]

Approved Sept. 10, 1884.
(Signed) MOSES HALLETT,
Dist. Judge.

40 I decline to sign the within bond or unite in any appeal by said Emma C. Whitsitt from the decree within recited.
Aug. 29, A. D. 1884.
(Signed) JAMES MESKEW.

In the Circuit Court of the United States for the District of Colorado. In Equity.

EMMA C. WHITSITT, JAMES MESKEW

vs.

THE UNION DEPOT AND RAILROAD COMPANY *et al.*

Alfred H. Miles, being first duly sworn, says on oath that on this 30th day of August, A. D. 1884, he, on behalf of said Emma C. Whitsitt, presented the above bond to James Meskew, one of the plaintiffs above named, and requested him to subscribe and seal said bond; that said James Meskew refused so to do, and thereupon, in the presence of deponent, subscribed the foregoing indorsement of refusal, which appears written upon said bond.

(Signed) ALFRED H. MILES.

Subscribed and sworn to before me this August 30, A. D. 1884. Witness my hand and notarial seal this day and year aforesaid.

[NOTARIAL SEAL.] (Signed) SAMUEL WISTRAM,
Notary Public, Arapahoe County, Col.

In the Circuit Court of the United States for the District of Colorado.

EMMA C. WHITSITT *et al.*

vs.

41 THE UNION DEPOT AND RAILROAD COMPANY *et al.*

Alfred H. Miles and Ebenezer T. Wells, being first duly sworn, say upon oath, each for himself, and not one for the other, that they are householders residing at said county of Arapahoe, in the State and district of Colorado, and worth in real and personal estate liable to execution and situate at said county the sums set opposite their respective names over and above all just debts and liabilities.

(Signed) ALFRED H MILES. $50,000.00.
(Signed) EBENEZER T. WELLS. $1,000.00.

Subscribed and sworn to before the undersigned, a notary public in and for the county of Arapahoe and State of Colorado, at said county of Arapahoe, this August 30, A.D. 1884. Witness my hand and notarial seal the day and year aforesaid.

[NOTARIAL SEAL.] (Signed) SAMUEL WISTROM, *N. P.*

Endorsed: C. C. 483. Emma C. Whitsitt *et al. vs.* The Union Depot and Railway Co. *et al.* Appeal bond No. 2. Filed Sep. 10, 1884. (Signed) Edward F. Bishop, clerk.

And the said citation is hereto attached, to wit:

Citation.

42 THE UNITED STATES OF AMERICA,
District of Colorado:

The United States of America to The Union Depot and Railroad Company, —— Taylor, —— Tobey, James H. Place, George W. Clayton, David O. Dodge, The Denver, South Park and Pacific Railroad Company, Walter S. Cheeseman, John W. Smith, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the 2 Monday of October next, pursuant to an appeal from a certain decree lately given in the circuit court of the United States for the district of Colorado, in a certain cause wherein Richard E. Whitsitt and James Meskew were plaintiffs and you were defendants, and on which said appeal Emma C. Whitsitt, sole devisee and heir-at-law of the said Richard E. Whitsitt, is the appellant and you are appellees, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Moses Hallett, one of the judges of the circuit court of the United States for the district of Colorado, this 10 day of September, in the year of our Lord one thousand eight hundred and eighty-four.

MOSES HALLETT, *Judge.*

43 *Proof of Service.*

THE UNITED STATES OF AMERICA, } *ss:*
District of Colorado, }

On this 10th day of September, A. D. 1884, personally appeared E. T. Wells before me, the subscriber, a clerk of the circuit court of the United States for the district of Colorado, and makes oath that he delivered a true copy of the within citation to Bela M. Hughes, Esq., one of the solicitors & counsel of the within-named appellees.

E. T. WELLS.

Sworn to and subscribed before me this 10th day of Sept., A. D. 1884.

[Seal United States District Court, District of Colorado.]

EDWARD F. BISHOP, *Clerk,*
By F. W. TUPPER, *Deputy Clerk.*

44 UNITED STATES OF AMERICA, } *ss:*
District of Colorado, }

I, Edward F. Bishop, clerk of the circuit court of the United States for the district of Colorado, sitting at Denver, do hereby certify the above and foregoing to be a true, perfect, and complete transcript

and copy of the record and proceedings heretofore filed or had and entered of record in said court and in a certain cause lately in said court pending, wherein Emma C. Whitsitt *et al.* were complainants and The Union Depot and Railroad Company *et al.* were defendants, as fully and completely as the same still remain on file or of record in my office.

In testimony to the above I do hereunto sign my name and affix the seal of said court, at Denver, in said district, this 12th day of September, A. D. 1884.

[Seal United States Circuit Court, District of Colorado.]

EDWARD F. BISHOP, *Clerk*,
By F. W. TUPPER, *Deputy Clerk*.

Cost of transcript:

115 folios, @ 10c.	11 50
Certificate	35
	$11 85

Paid by E. T. Wells, for Emma C. Whitsitt.

Endorsed on cover: Colorado C. C. U. S. No. 309. Emma C. Whitsitt, sole devisee & heir-at-law of Richard E. Whitsitt, deceased, appellant, *vs.* The Union Depot and Railroad Company *et al.* Filed 22d September, 1884.

122-363

Office Supreme Court U. S.
FILED
OCT 2 1883
JAMES H. MCKENNEY
CLERK.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, A. D, 1883.

EMMA C. WHITSITT, *sole devisee and heir at law of* RICHARD E. WHITSITT, *deceased, Appellant,*

vs.

THE UNION DEPOT AND RAILROAD CO. ET AL., *Appellees.*

APPEAL FROM THE CIRCUIT COURT FOR THE DISTRICT OF COLORADO.

BRIEF FOR APPELLANT.

E. T. WELLS,
Counsel for Appellant.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, A. D, 1883.

EMMA C. WHITSITT, *sole devisee and heir at law of* RICHARD E. WHITSITT, *deceased, Appellant,*

vs.

THE UNION DEPOT AND RAILROAD CO. ET AL., *Appellees.*

APPEAL FROM THE CIRCUIT COURT FOR THE DISTRICT OF COLORADO.

BRIEF FOR APPELLANT.

The bill filed in the circuit court sets forth (record p. 1) the settlement of the Denver Town site, in the year 1858, by an association called The Denver Town Company, on lands then part of the public domain; that said company opened roads, built bridges, etc., to facilitate access, and erected

hotels, corrals, public stables, and other like public buildings (p. 2); that the Town Company in May, 1859, allotted, set-off, donated and conveyed the premises in controversy to the Leavenworth and Pike's Peak Express Company; that in February, 1860, this conveyance was recorded in the office of the recorder of the county; and by divers mesne conveyances, the title of the Express Company came to and was vested in the plaintiff, Whitsitt; that the premises remained always vacant until possession assumed by plaintiffs as afterwards mentioned.

The bill further sets forth the passage of the act of Congress, May 28, 1864, authorizing the entry of the town site; the entry by James Hall, probate judge, May 6, 1865 (p. 3.); the issuance of the patent July 1, A. D. 1868, and conveyances by said Hall, and his successors in office, successively, investing the title to the premises in controversy in Amos Steck, probate judge (p. 3).

That next after the entry of said lands, the said Hall, probate judge, gave notice thereof by publication, etc., (p. 3); that on the 17th of July, 1865, within ninety days after the first publication of such notice, Ben Holliday, who by conveyance of the Leavenworth, etc., Express Co., then held the legal estate, signed a statement in writing containing an accurate description of the premises, and setting forth the specific right and estate, to wit: an estate in fee claimed by him, and filed such statement in the office of the probate judge, as required by the statute (p. 4).

That March 6th, 1868, one Chase applied to one Downing, then probate judge, who on that day, with-

out any notice to Holliday or any one claiming under him, and without any hearing or determination of the rights of the parties, or any action instituted for that purpose, conveyed the premises to said Chase (p. 4.)

That on the 17th day of April, A. D. 1878, the then probate judge, by deed of that date, reciting that it had been made to appear to him that the plaintiff, Richard E. Whitsitt, was the rightful owner by a regular chain of title from the Denver Town Company, etc., conveyed the premises to said plaintiff: that about the 22d day of April, 1880, Whitsitt leased to Meskow for one year and delivered possession, who on that same day entered and erected a house of the value of $1,000 (p. 5.)

That the Union Depot Company, claiming under said Chase, are threatening to destroy and tear down said house, and oust the said Meskow, the other defendants confederating and assisting.

That neither Chase nor any one under whom he claimed, was ever in any manner the occupant of the premises, nor the owner of any improvements thereon (p. 6.)

That defendants claim the deed of said Downing to Chase is conclusive evidence that at the date of the entry of said lands Chase was the rightful occupant of lots, or the *bona fide* owner of improvements thereon, and that inasmuch as neither said Whitsitt, nor any under whom he claims was at the date of the entry in actual occupancy of the said premises, plaintiffs can not be admitted to impeach the conveyance of said Downing to said Chase.

Whereas, plaintiffs claim and will insist under the act of congress for the relief of the citizens of Denver, plaintiffs, by reason of such first actual occupancy of the premises, is lawfully entitled thereto, and that the said Union Depot Company hold the estate derived under the conveyance of said Downing to said Chase as trustee for said Richard E. Whitsitt; and that according to the true intent and meaning of the act of congress of May, 28, 1864, the entry of said land by said James Hall was in trust for the several use and benefit, not only of the then occupants of said land, and the *bona fide* owners of the improvements, according to their respective interests, and to the extent of their several and respective occupancy of and improvement upon the several lots in said town site, and no further, but also in trust for those who might afterwards, at any time, become the first rightful occupants of any of said lots, at that time unoccupied, or the *bone fide* owners of improvements on such lots:—all which will be denied by plaintiffs.

Wherefore, this is a controversy arising under the laws of the United States.

That the premises exceed in value five hundred dollars, and the term of said Meskow exceeds in value five hundred dollars.

Prayer, that defendants be restrained from tearing down or destroying the house and improvements of plaintiffs; that the defendant, The Union Depot Company, be required to release and convey the premises to the plaintiffs, or that plaintiffs may have such further relief, or such other and different relief, as to equity shall seem meet, etc.

General demurrer for want of equity, and bill dismissed (p. 13.)

Other causes are assigned in the demurrer, to which it is not deemed necessary to refer.

The points upon which reliance is placed for the reversal of this decree are:

1. That the circuit court erred in sustaining the demurrer.

2. The circuit court erred in dismissing the plaintiffs's bill.

3. The circuit court decreed and determined that although plaintiffs were the first occupants of the premises in controversy, and the first to erect improvements thereon, such occupancy and improvement having its inception subsequent to the entry of the town site, created no right in the plaintiffs.

4. The circuit court decreed that the deed of the probate judge to the plaintiff, Whitsitt, conferred no right upon the plaintiffs.

All the acts of congress and the territorial statutes having reference to the matter in issue, are for convenience printed at length at the end of this brief.

I.

The bill presents a controversy arising under the laws of the United States, of which, therefore, the circuit court might entertain jurisdiction independent of the citizenship of the parties.

Act March 3, 1875, § 1.

II.

The plaintiffs being the first occupants of the lots are entitled to a conveyance thereof by virtue of such occupancy.

Prior to the passage of the pre-emption law of September 4, 1841, the congress had adopted the practice and rule of disposing of the public lands at public sale.

The same usage had been observed in respect to the disposition of lands which had been occupied, while still public, by towns and villages."*

The pre-emption law of September 4, 1841, which inaugurated as the policy of the government, the rule which has since prevailed of disposing of the public lands to actual occupants, expressly excepted from its operation lands "within the limits of incorporated towns," lands "selected as the site for a city or town," and "lands occupied for the purposes of trade, and not agriculture." 5 Stat., 453, § 10.

So that from that time forward the actual occupant of agricultural lands was entitled to a pre-emption at

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*See the act authorizing the survey and sale of the site of Cincinnati, 2 Stat. 352.

That of Detroit, 2 Stat. 308. That of Shawneetown, 2 Stat. 59; 3 Stat. 113. An act making further provision for settling the claims to land in the territory of Missouri, 2 Stat. 749. The act for the sub-division and sale of the tract of lands at the foot of the lower rapids of the Sandusky river, 3 Stat. 308. An act to authorize the appointment of a surveyor for the lands in the Northern part of the Mississippi territory, and the sale of certain lands therein, 3 Stat. 375. This act authorized the designation of ten sections for town sites, and the sale of the lots la'd off therein at public auction.

An act authorizing the disposal of certain lots of public ground in the city of New Orleans, and the town of Mobile, 3 Stat. 465. An act respecting the surveying and sale of the public lands in the Alabama territory, 2 Stat. 466. This act also au'horizes the reservation of ten sections for fown sites, and the sub-division into lots and the sale of the lots.

An act providing for the sale of three several tracts of land in Tuscawara

a specified acreage, while the settler upon town lands could obtain his title only by competition with all others at the public sales.

The act of May 13, 1844, (5 Stat. 657), was intended to correct this anomaly, as sufficiently appears from the first clause, "That whenever any portion of the surveyed public lands have been or shall be settled upon and occupied as a town site, *and therefore not subject to entry under the existing pre-emption laws*, it shall be lawful * * * for the judges of the county court, * * to enter at the proper land office * * the land so settled upon and occupied."

The statute being intended as a supplement to the "existing pre-emption laws," is to be construed in connection with them, and unless the contrary appears, its benefits must be deemed to be extended to the same class of persons, to wit: actual occupants; and to the same extent, to wit: to the extent of their occupancy.

This conclusion, from the antecedent legislation, *in pari materia*, is supported by the letter of the statute.

The entry of the lands by the corporate authorities, or the judges of the county court, it is declared

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county, in the state of Ohio, and for other purposes, 4 Stat. 56.

An act for laying off a town on Been river, in the state of Illinois, and for other purposes, 4 Stat. 334.

An act making provision for the sale and dispoisition of the public grounds in the cities of St. Augustine and Penascola, and to reserve certain lots and buildings for public purposes, etc., 4 Stat. 550.

An act to establish a town at St. Marks, Florida, 664.

An act for laying off the towns of Fort Madison and Burlington in the county of Des Moines, and the towns of Bellview, Du Buque and Peru in the county of Dubuque, Wisconsin territory, and for other purposes, 5 Stat. 70.

shall be made "in trust for the *several* use and benefit of the *occupants* thereof, *according to their respective interests.*"

It is supposed that upon this clause of the statute, if it stood alone, no two opinions could be indulged.

But the statute in another part provides that the entry shall be made in legal subdivisions, etc., and, next after the clause above quoted, proceeds to declare that "the execution of which trust as to the disposal of the lots in such town and the proceeds of the sales thereof to be conducted under such rules and regulations as may be prescribed by the legislative authority of the state or territory in which the same is situate."

From these provisions it has been thought that the clause last cited was intended to create a trust separate from and additional to that, for the several use and benefit of the occupants, declared in the previous language.

Cash's Appeal, 6 Mich. 193.
City of Denver vs. Kent, 1 Colo. 336.

It is submitted that the resolution in these cases is opposed both to the letter and the spirit of the act.

1. The language of that clause out of which the second trust, to wit: for the sale of the unoccupied lots is derived, is "the execution of *which* trust as to the disposal of the lots in such town, and the proceeds of the sales thereof to be conducted under such rules and regulations as may be prescribed by the legislative authority of the state or territory."

The word of reference "*which*," shows that the trust in respect to which the local legislature is au-

thorized to prescribe rules, is the same before declared, to wit: that "for the *several* use and benefit of the occupants, according to their respective interests."

2. The provision relied upon to enlarge the trust, is subsidiary to the principal object of the statute.

It relates solely to the ways and means of distributing the bounty of the government. To give it effect to enlarge the number of the beneficiaries, is to violate the maxim *Accessorium non ducit principale.*

3 If from the words "as to the disposal of the lots in such town and the proeeeds of the sales thereof," we infer that some portion of the lots are to be exposed for the competition of all comers, we must indulge the same conclusion as to all, for it clearly refers to all *the lots*, in every town site entered under the statute.

The construction given by the learned court of Michgan, is at variance with the spirit and the general policy of the law.

The statute was contrived to extend to the inhabitants of towns upon the frontier, the same privileges before extended to the settlers upon agricultural lands.

There are localities designated and marked by nature for the centers of population; localities which were the rallying points and bases of operation and supply, of our armies and those of other races,—both savage and civilized,—before us, to which the first occupants in peace congregated as inevitably as water seeks a level.

By the pre-emption law of 1841, and always before that, congress had invariably reserved to the govern-

ment the increase in the value of the public lands, occasioned by the formation of settlements at such localities.

Is it conceivable that it was the purpose of the act of 1844 to transfer these benefits to the first handful of settlers who might congregate at the frontier posts?

The act of 1841 contained stringent provisions against engrossing the public domain for speculation; it required the pre-emptioner to make oath that he had not settled upon the land "to sell the same on speculation, but in good faith to appropriate it, to his or her own exclusive use and benefit."

This provision is retained to this day.

Is it conceivable that by the act of 1844, it was intended to pave the way for speculation in town lots; while discouraging that in agricultural lands?

What special merit in the first settler or post trader, that he and his retinue of dependents should engross the whole of three hundred and twenty acres?

What special merit is there in assoeiations like the Denver Town Company, to command the bounty of Congress?

At the date of the entry of these lands, it is probable that by far the larger part of the six hundred and forty acres, entered by the County Judge, was virgin prairie.

The actual occupants were enjoying all that the purposes of their residence or trade demanded; is it

consistent with the language, or the legislation of Congress, that they should have more than this?

That those arriving before the 5th day of May, 1865, should have all; aud those arriving after that day none.

But it is said in the Michigan case, that the unoccupied lots are to be sold, and the proceeds invested for the public purposes of the community as such; the erection of public buildings, the support of public schools, "or any other general purpose that will conduce to the interest of the community as such"—are suggestod in the opinion of Mr. Justice Belford, in the case in Colorado.

Here again those who contend for the idea of a double trust, supply the supposed omission of the statute by their own inventions.

If the statute does in truth create a double trust, then the first only is for the benefit of occupants,—and is restricted to their actual possessions.

As to the second, the beneficaries are to be nominated by the local legislature: The legislature may dispose of the proceeds of sales for the benefit of the community of the town within which the lots lie; or for the benefit of some other similar community; or for the benefit of the state at large; or they may donate them to any person or persons whomsoever, as their wisdom or caprice may suggest.

And this, in effect, is conceded by the suggestion that the proceeds of the unoccupied lots may be appropriated to permanent public improvements; for these, in the nature of things, inure not only to the

inhabitants of the town at the date of the entry, but to all who come after them in perpetuity.

There is no necessity to accept the construction adopted by the court below in order to give effect to the clause in respect to the disposal of the lots, and the disposition of the proceeds of the sales thereof.

The lands are not donated by congress to the county judge; nor was it the intention that he should donate them to the occupants.

Each must pay his just share of the cost of the land entry; and of the execution of the trust; he obtains his title for a price. This is nothing more nor less than a sale; and these, we submit, are the sales mentioned in the clause in question.

When this case was here upon a former appeal (which was dismissed for want of affidavits of value) the positions relied upon by counsel for appellee were presented in argument, and anticipating that the same positions will be reiterated it is thought proper to notice them here :

It was argued that the decree of the circuit court was in obedience to an established course of decision of the state court, constituting a rule of property.

The cases following were cited to this proposition :

Cook vs. Rice, 2 Colo. 135.
Clayton vs. Spencer, 2 Colo. 380.
Adams vs. Binkley, 4 Colo. 248.

But in each of these cases there was an actual occupancy and *bona fide* improvement at the date of the entry, May 6, 1865.

Thus in Cook vs. Rice, it is said in the opinion of the court "The evidence *clearly establishes* * * *that one John Dalton entered upon this land in* 1860, erected a house or cabin, and occupied it with his family until 1863, he then conveyed it to Isaac N. Campbell, who entered into occupation and resided with his family until April, 1865.

Campbell placed some additional improvement on the property, and on the 7th day of June, 1866, conveyed these lots to Rice, who it appears has been in possession ever since. * * There is nothing in the record to show that the complainant ever was in the occupation of the property, or ever placed any improvements thereon."

2 Colo. 135.

In Clayton vs. Spencer, it is declared as the conclusion of the court "The evidence shows that Mary McLaughlin, through whom the appellee claims title, was in the *actual occupancy* of this property prior to and at the date of the entry, and that her possession continued until March, 1867. * * *It does not appear that Clayton or his grantors were ever in the actual occupany* of these lots."

2 Colo. 380.

In Adams vs. Binkley, the court say: "The town site of Rosita was entered March 22, 1876. The evi-

dence shows that on the 16th of October, 1875, the premises were unimproved and unoccupied. That at or about that date Adams *entered upon and took actual possession* of the same, erected a house and occupied the same continuously from November 20, 1875, until May 1, 1877. * * Binkley's claim is based on a deed from Bradbury. * * Bradbury does not appear to have ever occupied or improved the premises, nor does Binkley after his purchase from Bradley."

4 Colo. 248.

It is manifest, therefore, that these cases have no bearing at all upon the true resolution of the question here presented.

In each of these cases there was clear proof of an actual occupancy, and *bona fide* improvement at the date of the entry in the successful party.

In this case the defendant, by the confession of his demurrer, never had either. The possession lay vacant until the plaintiff's entry in 1879.

Our contention that as to the lots vacant at the date of the entry the trust remained in abeyance until by a subsequent actual occupancy the beneficiary should be appointed, has never been made, except in The City vs. Kent, before cited.

It is true that in Cofield vs. McClellan, 16 Wall. 333, Mr. Justice Hunt says that "Those in possession of the lands when the entry shall be made by the probate judge are the persons for whom he holds the lands in trust, and to whom he is to make the respective deeds."

But in that case, as in other cases, the evidence was found to be "strong and quite convincing" that "at the date of the entry the defendant was in the actual possession * * with valuable improvements made therein."

As appears by the reporter's statement of the case, the plaintiff claimed "a prior settlement by one Preston in 1859, a conveyance by Preston to Hall, several intermediate conveyances by which the lot came to Bates, a conveyance by Bates to the complainant." But there was no pretense that the plaintiff had ever presented the statement of his claim to the probate judge as required by the territorial legislature.

The question was therefore two-fold, to wit: 1st. Was the plaintiff the first occupant? 2nd. What was the effect of his failure to present the statement of his claim to the probate judge, within the time limited by statute.

It is manifest that the resolution of these questions does not involve those presented in the present case.

The remarks of Mr. Justice Hunt were therefore mere *dicta*, and in the language of Marshall, C. J., in Cohen vs. Virginia, "ought not to control the judgment in another suit, when the very point is presented for decision."

6 Wh. 399.

The "rule of property" for which our adversaries contend depends, therefore, on the decision of one state court; the decision of one territorial court divided; and the dictum of one justice of this court.

Upon what principle shall these errors of the courts of Michigan and Colorado control the interpretation of federal statutes for other states and territories?

And what shall be said of this rule of property when this court shall hereafter be called upon to apply the same in controversies between the inhabitants of the state of Nevada, where, so long ago as the year 1872 it was held that in order to entitle one to the benefits of the act of congress he must be an *actual* occupant.

Tredway vs. Wilder, 8 Nev. 98.

And that the act of congress was intended for the benefit and protection of the actual citizens of the town, and that it was not the intention of congress that unoccupied lands within the town site at the time of the entry should become the property of the citizens of the town.

Lechler vs. Chapin, 12 Nev. 65.

III.

The plaintiffs are entitled to relief by virtue of the conveyance of the probate judge of April 17, A.D. 1878, if not by virtue of their prior occupancy.

The bill avers and the demurrer admits, that the lots in controversy were vacant and unimproved at the date of the entry.

If the interpretation given to the statute by the supreme court of Colorado in The City vs. Kent, shall prevail in this court, then as to these premises, the legislature had absolute power of disposal.

They might devote them to a public use, or allot them to any private person, supposed to be deserving in the premises.

This they attempted to do by the act of Frebruary 8, A.D. 1872.

This act was passed to supply the defects in the previous legislation of the territory, supposed to have been developed by the decision of the supreme court in The City vs. Kent; and to conform the law touching the disposition of the unsettled lots to the view expressed in the majority opinion that case.

The provisions of section 9, which we invoke to support the conveyance of the probate judge, of April 17, A.D. 1878, were in recognition of the equities of the many persons who had, in good faith, purchased the supposed title of the founders of the town, and by accident or their own default, had been prevented from receiving the conveyance of the probate judge.

The prior collusive conveyance to Chase, did not obstruct the legislative power in this respect;—being in confessed violation of the regulations prescribed by the territorial laws of 1864 (§§ 4, 5 and 8), it was void by the letter of the act of Congress.

All such conveyances will on bill in equity by the grantee of the probate judge, under the provisions of the act of the Legislature of Colorado of February 8, 1872, be swept out of the way, as expressly held by the supreme court of Colorado in Downing vs. Bartels, (M. S.)

IV.

If by reason of either actual prior occupancy, or the conveyance of the probate judge of April 17, 1878, the plaintiffs are entitled to the premises, the defendant must be deemed to hold as a trustee, and may be compelled by decree to convey.

Silver vs. Ladd, 7 Wall. 228.
Clayton vs. Spencer, 2 Colo. 381.

V.

The lapse of time is no bar to the plaintiffs' equity.

1. Because, until February, 1874, there was no statutory limitation in Colorado, upon an action to recover real property.

Acts Colorado, 1874, p. 177.

2. The plaintiffs are entitled to relief, if at all, solely by reason of their first actual occupancy; or by reason of the conveyance of the probate judge, of April 17, 1878.

Either of these events is sufficiently recent to exempt the case from the statutory bar, or the equitable maxim against stale claims.

E. T. WELLS,
For Plaintiff in Error.

STATUTES

REFERRED TO IN THE FOREGOING BRIEF.

AN ACT for the Relief of the Citizens of Towns upon the Lands of the United States, under certain circumstances.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress Assembled:

That whenever any portion of the surveyed public lands has been or shall be settled upon and occupied as a town site, and therefore not subject to entry under the existing pre-emption laws, it shall be lawful, in case such town or place shall be incorporated for the corporate authorities thereof, and, if not incorporated, for the judges of the county court for the county in which such town may be situated, to enter, at the proper land office, and at the minimum price, the land so settled and occupied, in trust for the several use and benefit of the occupants thereof, according to their respective interests; the execution of which trust, as to the disposal of the lots in such town, and the proceeds of the sales thereof, to be

conducted under such rules and regulations as may be prescribed by the legislative authority of the State or Territory in which the same is situated: *Provided*, that the entry of the land intended by this act be made prior to the commencement of the public sale of the body of land in which it is included, and that the entry shall include only such land as is actually occupied by the town, and be made in conformity to the legal subdivisions of the public lands authorized by the act of twenty-fourth April, one thousand eight hundred and twenty, and shall not in the whole exceed three hundred and twenty acres; *And Provided, also*, That any act of said trustees not made in conformity to the rules and regulations herein alluded to, shall be void and of none effect; *And Provided, also*, That the corporate authorities of the town of Weston in the county of Platte, State of Missouri, or the county court of Platte county, in said state, shall be allowed twelve months from and after the passage of this act to enter at the proper land office, the lands upon which said town is situate.

Approved May 23, 1844.
5 Stat. 597.

AN ACT for the Relief of the Citizens of Denver, in the Territory of Colorado.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress Assembled:

That the provisions of an act of Congress entitled "An Act for the relief of the citizens of towns upon

the lands of the United States, under certain circumstances," approved May 23, 1844, be so extended as to authorize the probate judge of Arapahoe county in the Territory of Colorado, to enter at the minimum price, in trust for the several use and benefit of the rightful occupants of said land, and the *bona fide* owners of the improvements thereon, according to their respective interests, the following legal subdivisions of land, or such portions thereof as are settled and actually occupied for town purposes by the town of Denver aforesaid, to wit: Section number thirty-three, and the west half of section number thirty-four, in township number three south of range numbe sixty-eight west of the sixth principal meridian: *Provided, however,* That there shall be reserved from such sale and entry such blocks or lots in the town of Denver as may be necessary for government purposes, to be designated by the commissioner of the general land office.

SEC. 2. *And be it further enacted,* That in all respects except as herein modified, the execution of the foregoing provisions shall be controlled by the provisions of said act of twenty-third May, eighteen hundred and forty-four, and the rules and regulations of the commissioner of the general land office.

Approved May 28, 1864.
13th Statutes, 94.

AN ACT Prescribing Rules and Regulations for the execution of the Trust arising under the Act of Congress, entitled "An Act for the Relief of Citizens of Towns upon lands of the United States under certain circumstances."

Be it [enacted] ordained by the Council and House of Representatives of Colorado Territory :

SEC. 1. When the corporate authorities of any town, or the judge or judges of the county court for any county in this Territory in which any town may be situated, shall have entered at the proper land office, the land or any part of the land settled and occupied as the site of such town, pursuant to and by virtue of the provisions of the act of Congress, entitled "An act for the relief of citizens of towns, upon lands of the United States, under certain circumstances," passed May 23, A.D. 1844, and any amendments that may be made thereto, it shall be the duty of such corporate authorities, or judge, or judges, (as the case may be), and they are hereby directed and required to dispose of and convey the title of such land, or to the several blocks, lots, parcels, or shares thereof, to the persons hereinafter described, and in the manner hereinafter specified.

SEC. 2. Any such corporate authorities, or judge, or judges, holding the title of such lands in trust, as declared in the said act of Congress, shall be a good and sufficient deed of conveyance to grant and con-

vey the title to each and every block, lot, share or parcel of the same to the person or persons who shall have, possess or be entitled to the possession or occupancy thereof, according to his her or their several and respective rights or interest in the same, as they existed in law or equity at the time of the entry of such lands, or to his, her or their heirs or assigns, and when any share or parcel of such lands shall be occupied or possessed by one or more persons claiming the same by grant, lease or sale from one or more persons the respective rights and interests of such persons in relation to each other in the same, shall not be changed or impaired by any such conveyance. Every deed to be made by such corporate authorities, or by such judge or judges, pursuant to the provisions of this act, shall be so executed and acknowledged as to admit the same to be recorded.

SEC. 3. Within thirty days after the entry of any such lands, the corporate authorities, or judge or judges entering the same, shall give public notice of such entry by posting notice thereof in at least three public places in such town, and by publishing such notice in a newspaper printed and published in the county in which such town shall be situated; or, in case there shall not be any newspaper published in such county, then in some newspaper printed and published nearest to such town in this Territory. Such notice shall be published once in each week for at least three successive weeks, and shall contain an accurate description of the lands so entered, as the same is stated in the certificate of entry, or duplicate receipt for the purchase money

thereof, given by the land officers at the time of such entry.

SEC. 4. Each and every person or association, or company of persons, claiming to be an occupant or occupants, or to have possession, or to be entitled to the occupancy or possession of such lands, or to any lot, block, share or parcel thereof, shall within ninety days after the first publication of such notice, in person, or by his, her or their duly authorized agent or attorney, sign a statement in writing containing an accurate description of the particular parcel or parts of land in which he, she or they claim to have an interest, and the specific right, interest or estate therein, which he, she or they claim to be entitled to receive, and deliver the same to or into the office of such corporate authorities, judge or judges, and all persons failing to sign and deliver such statement, within the time specified in this section, shall be forever barred the right of claiming or recovering such lands, or any interest or estate therein, or in any part, parcel or share thereof, in any court of law or equity.

SEC. 5. In case there shall be adverse claimants to such lands, or to any part, parcel or share thereof, either party may bring a suit in a chancery against the adverse claimant or claimants, in the district court of the judicial district, or in any court of competent jurisdiction, and in the county in which the lands shall be situated, or in any county to which the county in which such lands shall be situated, is attached for judicial purposes: *Provided, always,* That no judge of the district court, or probate judge, who

has been an adverse claimant, directly or indirectly, of any portion of the lands embraced within such town, or who is a party to any action brought to determine the right to a conveyance of any portion of the lands within such town, shall entertain, hear or determine any proceeding, interlocutory or final, in any action brought to determine any such claims by or between any parties whomsoever, but in all such cases, if the cause or proceeding shall be pending in a district court, the judge thereof shall order all papers, with a transcript of the record in the cause, to be transmitted to another judicial district, as in case of a change of venue, and if the cause or proceeding shall be pending in a probate court, the judge thereof shall order all papers with a transcript of the record to be transmitted to the probate court of the nearest county, where the cases complained of do not exist, as in cases of change of venue, and the cause shall proceed in the court to which the same be removed, in the same manner as if originally instituted in that court; *Provided, also,* that the laws applicable to a change of venue shall apply to actions brought under this act; *And Provided, also,* That nothing in this act shall prevent the district judge of the district in which any such lands are situated, from executing any and all conveyances of such lands pursuant to the determination of such action. Suits brought under the provisions of this act shall be brought against adverse claimants as defendants, and it shall not be necessary to make the judge or corporate authorities holding the trust parties thereto, except as provided in section nine of this act. The complainant's bill shall show what interest or estate in

the lands in controversy the complainant claims, and defendant shall answer such bill as in cases of chancery. Pleadings and proceedings in such actions shall be as in cases in chancery, except that oral testimony may be introduced upon the trial of the cause.

SEC. 6. Upon the trial of any such action, either party may give in evidence the statement mentioned in the fourth section of this act, deposited by the other, or by the person under whom he or she claims, with the corporate authorities, or judge or judges, holding the title to the lands in controversy therein, and the person or persons who shall have first acquired the right to the possession or occupancy of such lands, either in person or by agent, attorney, servant or tenant, or those claiming him, her or them, shall in any such action be deemed to have the prior and permanent right to such lands, and any rule of law or equity which would prevent a determination in accordance with such private right, shall be disregarded in such action.

Upon the trial of any such action, the evidence of the witnesses, if not in the form of depositions, shall be reduced to writing, and being certified by the presiding judge, shall be filed with the papers in the cause. *Provided*, That nothing in this section shall be so construed as to recognize the right of any person or persons who have virtually abandoned any land held as a town site, to any title therein.

SEC. 7. Appeals and writs of error shall be allowed, and may be taken and prosecuted from the

judgments or decrees of the courts, in proceedings under this act, to the supreme court, as in other cases.

SEC. 8. In case suits shall not be brought, as provided in this act, for the purpose of settling or determining any controversy between adverse claimants to any such lands within sixty days after the expiration of the time for filing the statement as provided in section four of this act, if the title to such land shall be held by any judge, it shall be the duty of such judge to summon the adverse claimants to appear before him at a time and place to be mentioned in such notice, and which place shall be within the county in which such land shall be situated, and make their proof and allegations in reference to such adverse claims, at the time and place of the return of such summons. If the same shall have been served as provided in this act, the judges shall, if the parties appear, proceed to hear their proof and allegations, and shall thereupon determine in writing the controversy between them. Upon such hearing the statements of the parties respectively deposited with such judge, as required by the fourth section of this act, shall stand for their pleadings, and neither party may use in evidence the statement by the other, or by the person under whom he or she claims. The evidence of the witnesses sworn upon such trial shall be reduced to writing, and any witness who shall upon hearing wilfully and knowingly testify falsely shall be deemed guilty of perjury. Any such judge or justice of the peace may issue subpœnas to compel the attendance of witnesses upon such hearing, and any person served with such subpœna shall be

deemed guilty of contempt of said judge, and may be attached to answer such contempt, and to testify in the case. There shall be no postponement in the hearing of such cases, except for cause. The summons issued by the judge, and all subpœnas issued in such cases, shall be directed and served in the same manner as in actions at law, except that such summons, in case where the person named therein cannot be found, may be served upon the agent or attorney, who shall have filed the statement mentioned in section four of this act. The fees of the officers and witnesses in such cases shall be the same as for like services in actions of court of record. Either party in any such case may appeal from the determination of any such judge therein to the supreme court in the same manner that a party may appeal from any judgment in an action at law in the district court. If an appeal shall be allowed, the judge shall transmit to the clerk of the supreme court, a transcript of the statements standing for the pleadings in the case, the evidence and the determination of the judge in writing.

In case any party lawfully summoned to appear before such judge, as mentioned in this act, shall fail to appear at the time and place metioned in the summons, he shall be deemed to have waived and relinquished all right, title and interest and estate in the said lands so in controversy, and each and every piece, parcel and share thereof, and shall be forever barred from asserting or claiming any right, title, interest or estate therein.

SEC. 9. If in a case mentioned in section eight of this act, the title to any such lands shall be held by

the corporate authorities of any town, such corporate authorities may bring on action in the district court of the judicial district, and in the county in which the lands in controversy shall be situated, or in some county to which such county shall be attached for judicial purposes, to settle and determine such controversy. Such suit shall be commenced on the chancery side of the court, by bill, in the nature of a bill in [of] interpleader, which bill shall set forth, a description of the lands claimed by adverse claimants, and the character and extent of the right or interest or estate therein claimed by each as the same shall appear by the statements deposited with such authorities, pursuant to section four of this act, and the names of all adverse claimants who shall have filed such statements, and shall pray that the several adverse claimants shall be required to appear in such court and prosecute such claim, or be forever barred therefrom. Any claimant to such land who shall fail to appear and answer such bill, and thus prosecute his claim to the land described in such bill, pursuant to the summons in such case and the practice of the district court, shall be forever barred of the right to assert any claim or title to the lands in controversy, adverse to the other claimants, their representatives or assigns, elsewhere, or in any court whatsover. If the adverse claimants to the lands described in the bill in such case shall appear, they shall respectively answer such bill, and either disclaim any right, title or interest or estate in the land described, or set forth the nature, character and extent of the title, interest or estate which he, she or they respectively claim therein. Issues between such adverse claimants made

by their answers to such bill, may be brought to a hearing, and shall be determined, and such determination may be received by the supreme court in the same manner and by the same rules of law and evidence, as in other cases mentined in sections five, six and seven of this act.

SEC. 10. Whenever any summons issued under the provisions of this act, cannot be served upon the person or persons named therein, nor upon the agent or attorney of such person or persons who shall have filed a statement, as required in the fourth section of this act, and the complainant or judge, as the case may be, shall file an affidavit, as provided in the eighth section of "an act concerning practice in chancery," approved October 4, 1861, it shall be lawful for the judge, or the clerk of the court, as the case may be, to cause publication to made, as provided in said section of said act, concerning practice in chancery; and when such publication shall have been made the cause shall proceed as if the parties had been personally served with process.

SEC. 11. As soon as may be after the expiration of sixty days from the first publication of the notice mentioned in the third section of this act, the corporate authorities, judge or judges holding the title to the lands described in such notice, shall make a true statement in writing, containing a true account of all moneys by him or them expended in the acquisition of the title, and the administration or execution of the trust to that time, including the moneys paid by him or them for the purchase of said lands,

all necessary traveling expenses, all moneys paid for publishing and posting such notices, and for proof thereof, and for all other necessary and proper expenses incident to such trust, and also a true account of his or their charges for time and services employed in the business of such trust to that time. The whole amount of such account for moneys and reasonable charges for compensation shall be a charge upon the lands so held in trust in favor of the trustee, and shall be paid by the several claimants entitled to such lands, in proportion to the several quantities or shares thereof to which they may be respectively entitled.

SEC. 12. Before the corporate authorities or judge or judges holding any such lands in trust, as aforesaid, shall be required to execute, acknowledge or deliver any deed or conveyance thereof, as hereinbefore mentioned, to any person or persons claiming to be entitled to such deed, such person or persons shall pay or render to him or them the sum of money chargeable on the part thereof, to be conveyed by such deed, according to the statement or account mentioned in the eleventh section of this act, the amount to be determined by the proportion which the quantity of the land to be described in such deed, shall bear to the whole quantity of the land of which it is a part, compared with the whole amount thus charged upon the whole quantity of land, together with the interest on each of the money items of such account, at the rate of twenty-five per centum per annum, from the time when the same account, and also such further sums as shall be a reasonable compensation for preparing, executing and acknowledg-

ing such deed, and the fees of the officers taking the acknowledgment thereof: *Provided*, That no mayor or judge holding such lands in trust, shall be entitled to receive more than than fifty cents for a deed containing the description of one lot, block or parcel of land, nor more than five cents for each additional lot, block or parcel of land described in such deed, and no clerk of any incorporated town, shall be entitled to receive more than ten cents for attesting with the seal of such town, the execution of any deed by the corporate authorities of such town.

SEC. 13. After the expiration of ninety days from the time of the first publication of the notice mentioned in the third section of this act, the corporate authorities or judge or judges holding the title to the lands described therein, shall, upon a reasonable demand or request, and upon the payment or tender to him or them of the moneys mentioned in the twelfth section of this act, execute, acknowledge and deliver to each and every claimant, or association, or company of claimants to such lands, or any lot, block, parcel or share thereof, a deed of conveyance thereof, as prescribed in the second section of this act, and according to the statement made and deposited by him or them, pursuant to the fourth section of this act: *Provided, however*, That no such deed of conveyance shall be acknowledged or delivered for any part, lot, block or share of such lands to which there shall be adverse or contesting claimants, until the controversy thereon shall have been settled or determined, in the manner hereinbefore prescribed, and whenever any such controversy shall have been so settled and de-

termined the corporate authorities, or judge or judges, shall, upon the like demand or request, and the like payment or tender, and by the like deed of conveyance, convey the lands or interest or share therein, the right to which shall have been thus ascertained, to the person or persons thereby determined to be entitled to the same.

SEC. 14. When a town site is entered under the act of Congress mentioned in this act, by the corporate authorities of any incorporoted town, deeds shall be made by the mayor or other chief officer of such town for the time being under the corporate seal of such incorporated town, and attested by the clerk or registrar of such town, and if such incorporated town have no seal, then under the scrawl or private seal of said mayor or other chief officer, attested by the clerk or registrar as aforesaid. When the land is entered by the judge or judges of the county court, deeds shall be signed by such judge or judges, under his or their private seal or scrawl.

SEC. 15. In case any judge who shall have entered any such land under the provisions of the said act of Congress, and thus become the sole trustee thereof, shall be possessed of or entitled to the same, or any part, lot, block or share thereof, according to and by virtue of the provisions of this act, and his claim or right shall not be claimed adversely to him by any person; he shall be and be deemed to be seized and possessed of the title thereto, and the estate therein to his own use in fee simple, absolute, free and discharged of such trust, and no conveyance other than

the patent of the lands including the same shall be necessary to perfect his absolute title thereto.

In case such land or interest, or share in such land so claimed by such judge shall be claimed by any other person or persons adversely to him, the conflicting claims between him and such other person shall be adjusted by settlement or action as hereinbefore prescribed, and in such case of action at law the issues therein shall be tried before some judge who snall be disinterested and possessed of competent jurisdiction to hold court for the trial of and to render judgment in such action.

SEC. 16. For all the purposes of determining the rights of adverse claimants to any lands so entered, pursuant to the said act of Congress, the corporate authorities or judge or judges hereinbefore mentioned shall be deemed to possess and hold the title to the lands so entered in such trust, from the time of the entry thereof.

SEC. 17. The costs in the actions mentioned in this act, and in proceeding before the judge, as prescribed in the eighth section of this act, shall [be] regulated and recoverable as in other civil actions.

SEC. 18. If the title to any such lands shall be vested in any judge, such judge shall convey to the people, or to the legal authorities, the land used or laid out by the town authorities, as streets, lanes, avenues, parks, commons and public grounds, within such times as is herein prescribed for making conveyances to individuals.

SEC. 19. Whenever the title to such lands shall be held by the corporate authorities of any town, all lands used, laid out or designated for public use by such corporate authorities, as streets, lanes, avenues, alleys, parks, commons and public grounds, shall rest in and be held by the corporation absolutely, and shall not be claimed adversely by any person or persons whomsoever, and it shall not be necessary to execute any conveyance for the same to the corporation or the people of such town.

SEC. 20. Each and every person and association and company of persons who shall be entitled to any lots, pieces or parcels of land held in trust under the act of Congress aforesaid, by the authorities of any incorporated town, and respecting which there shall be no controversy, shall within three months after the expiration of the time mentioned for filing statements, pay or tender to the corporate authorities holding such lands in trust, the sum of money chargeable upon such lot, pieces or parcels of land, together with the interest thereon and fees for preparing, executing and acknowledging a deed to such lands, and in case of a failure so to do, such person or persons shall be deemed to have relinquished all right, title and interest and estate in such lands, and each and every piece, parcel and share thereof, and shall be forever barred the right of asserting or claiming any right, title, interest or estate therein, and such incorporated authorities, shall thereafter be and be deemed to be seized and possessed of the title thereto, to their own use in fee simple absolute, free and discharged of such trust, and no conveyance other than the

patent of the lands including the same, shall be necessary to perfect their absolute title thereto, and any person or persons who shall be entitled to any lots, parcels or pieces of land, held in trust by any incorporated authorities, as aforesaid, and respecting which there has been adverse claimants, shall within three months after the final determination of any action between the adverse claimants respecting such lands, pay or tender to such incorporate authorities, holding such lands in trust, the sum of money chargeable upon such lots, pieces or parcels of land, together with the interest and fees for preparing, executing and acknowledging a deed to such land, and in case of a failure to do so, such person or persons shall be deemed to have relinquished all right, title and interest and estate in such lands, and each and every piece, parcel and share thereof, and shall be forever barred the right of asserting or claiming any right, title interest, or estate therein, and such corporate authorities shall be, and be deemed to be seized and possessed of the title thereto, to their own use in fee simple absolute, free and discharged of such trust and conveyance other than the patent to the lands including the same, shall be deemed necessary to perfect their absolute title thereto.

SEC. 21. Probate judges are hereby declared to be county judges for the purpose of executing the trust mentioned in said act of Congress.

SEC. 22. This act to take effect and be in force from and after its passage.

Approved March 11, 1864.
Acts of Colorado, 1864, p. 139.
Rev. Stat. 1868, p. 619.

AN ACT to Provide for the further Execution of the Trust relating to the Town Site of the City of Denver, and to Regulate the same.

Be it enacted by the Council and House of Representatives of Colorado Territory:

SEC. 1. That the probate judge of the county of Arapahoe and Territory of Colorado, shall proceed and make, or cause to be made as soon as practicable after the passage of this act, a list of all the town lots or parcels of land embraced within section number thirty-three (33), and the west half of section number thirty-four (34), in township number three (3), south of range number sixty-eight west in said county, to which no person, association of persons, or body corporate, except the City of Denver, filed any claim with the probate judge of said county on or before the 9th day of August, A.D. 1865: *Provided*, That said list shall not embrace such lots and lands as have since the date last aforesaid been deeded in good faith by the probate judge of said county to any rightful owner thereof, holding the same by proper chain of title under and from the Denver Town company. * * * *

SEC. 2. The probate judge of said county shall immediately upon the preparation of said list, proceed and advertise said lots and lands for sale in some newspaper published in said city for sixty days, at public vendue, to the highest and best bidder for cash in hand, upon the day and at the time and

place mentioned in such advertisement, proceed and sell the same to the highest and best bidder therefor for cash.

SEC. 3. If any person or persons shall, prior to the time of said sale, file his, her or their petition in writing before said judge showing that he, she or they have at any time, either before or since the entry of said lands acquired an interest in any lot or lands so listed as aforesaid, by purchase or occupation in good faith, without actual notice of the legal defects to the title thereof, and that he, she or they had also, prior to the 25th day of January, 1872, improved such lot, lots or lands, by the erection of a dwelling house thereon, setting forth the particular facts in relation thereto, and the time at which such rights occurred and facts transpired it shall be the duty of said judge to set the matters and allegations of such petition down for hearing; and if the petitioner or city attorney of said city requests it, the said judge shall impannel a jury of six men who shall take an oath to faithfully inquire into the facts alleged in the petition, and a true verdict give as to their truth; and said jurors shall have the same qualifications and powers, and shall be empanelled in the same manner, as respects challenges, and in other respects as in civil cases; and if upon the trial such jury or the said court, in case no jury is demanded as aforesaid, shall find the facts stated in such petition to be true, and that the petitioner or petitioners have erected a dwelling house on such lot or lots, it shall be the duty of said judge to withdraw such lot, lots or lands from said list, and upon the payment to him of the

cost of such trial, and his reasonable fees and expenses, shall execute and deliver to such petitioner or petitioners a deed or deeds granting and conveying to him, her or them the fee simple title to any such lots or lands. The trial in any such case as is contemplated by this section of this act, shall be final and conclusive on the City of Denver and on all parties, unless for good cause, or because the same is manifestly unreasonable or contrary to evidence, the court shall set aside the verdict of the jury, but no more than two new trials shall be allowed in any one case.

SEC. 4. The said probate judge shall make, execute and deliver to the purchaser or purchasers of any such lots or lands sold by virtue of this act, a deed or deeds, granting and conveying to him, her or them, the fee simple title therein, which deed shall vest in the grantee thereof all the title therein; and shall authorize and empower him, her or them, to bring and maintain all such suits in ejectment or other suits and proceedings as may be necessary for the canceling of any deed or deeds theretofore made, wrongfully or fraudulently, by any former probate judge.

SEC. 5. Said probate judge shall make or cause to be made and kept a record of all or any such lots or lands so sold, showing the advertisement, the parcels of lands or lots sold, the price paid, and the persons to whom sold and deeded.

SEC. 6. The said probate judge shall give ten (10) days previous notice in some daily newspaper published in said city, of the time when he will commence making said list of lots and lands, and shall

sit from day to day for the purpose of preparing the same, at which the city attorney or any citizen on the part of the city shall have the right to be present, and may suggest to said judge, by petition, any lots or lands that may have been omitted, and that any filing or filings theretofore made, which may appear to have beem made on or before the 9th day of August, 1865, were in fact made after that time, and it shall be the duty of said probate judge to inquire into the same by such competent testimony as may be produced before him in that behalf, and if he shall be of opinion that such lots or lands have been wrongfully omitted, he shall thereupon include the same in such list, and proceed to advertise and sell the same.

SEC. 7. All moneys arising from any sale of said lots or lands, shall be paid over by the purchaser to the treasurer of said city Denver, for the use and benefit of the public schools of said city, and shall be distributed to the different boards of school directors of said city, as the city council may direct.

SEC. 8. The city council shall audit and allow any reasonable bill or bills of said probate judge for making said list of lots, and for making said sales, and the expenses thereof, and shall order the same paid out of any money received as aforesaid.

SEC. 9. The owner or owners of any lots or lands within the limits aforesaid, to which deeds have heretofore been made by any probate judge of said county who may be the rightful owners thereof, holding the same by proper chain of title under and from the Denver Town Company, may at any time hereafter

apply to said probate judge for a deed, or deeds, to the same lots, or lands, and on such application, and the payment to him of his reasonable fees and expenses of executing the same, it shall be the duty of said judge to execute and deliver a deed or deeds to such owner or owners granting and conveying to such owner or owners the fee simple in and to such lots and lands, notwithstanding said claimants or their assignors may have failed to file their claim or claims to said lots or lands on or before the 9th day of August, 1865, as required by law, and such deed or deeds so as aforesaid issued by said judge shall vest in the grantee or grantees thereof the legal title in fee simple to said lots or lands.

SEC. 10. All acts or parts of acts inconsistent with this act, in so far as they are inconsistent, are hereby repealed.

SEC. 11. This act shall be in force and take effect from and after its passage.

Approved February 8th, 1872.
Acts of Colorado, 1872, p. 191.

COLLINS, PRINTER, 408½ CHAMPA, DENVER.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, A. D. 1884.

EMMA C. WHITSITT, *sole devisee and heir at law of* RICHARD E. WHITSITT, *deceased*, *Appellant*,

vs.

THE UNION DEPOT AND RAILROAD COMPANY ET AL., *Appellees.*

APPEAL FROM THE CIRCUIT COURT FOR THE DISTRICT OF COLORADO.

BRIEF FOR APPELLANT.

E. T. WELLS,
for Plaintiff in Error.

COLLINS, PRINTER, 404 CHAMPA, DENVER.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, A. D. 1884.

EMMA C. WHITSITT, *sole devisee and heir at law of* RICHARD E. WHITSITT, *deceased*, *Appellant*,

vs.

THE UNION DEPOT AND RAILROAD COMPANY ET AL., *Appellees.*

APPEAL FROM THE CIRCUIT COURT FOR THE DISTRICT OF COLORADO.

BRIEF FOR APPELLANT.

The bill filed in the circuit court sets forth (record p. 1) the settlement of the Denver Town site, in the year 1858, by an association called The Denver Town Company, on lands then part of the public domain; that said company opened roads, built bridges, etc., to facilitate access, and erected hotels,

corrals, public stables, and other like public buildings (p. 2); that the Town Company in May, 1859 allotted, set-off, donated and conveyed the premises in controversy to the Leavenworth and Pike's Peak Express Company; that in February, 1860, this conveyance was recorded in the office of the recorder of the county; and by divers mesne conveyances, the title of the Express Company came to and was vested in the plaintiff, Whitsitt; that the premises remained always vacant until possession assumed by plaintiffs as afterwards mentioned.

The bill further sets forth the passage of the act of congress, May 28, 1864, authorizing the entry of the town site; the entry by James Hall, probate judge, May 6, 1865 (p. 3); the issuance of the patent July 1, A. D. 1868, and conveyances by said Hall, and his successors in office, successively, investing the title to the premises in controversy in Amos Steck, probate judge (p. 3).

That next after the entry of said lands, the said Hall, probate judge, gave notice thereof by publication, etc., (p. 3); that on the 17th of July, 1865, within ninety days after the first publication of such notice, Ben Holliday, who by conveyance of the Leavenworth, etc., Express Co., then held the legal estate, signed a statement in writing containing an accurate description of the premises, and setting forth the specific right and estate, to wit: an estate in fee claimed by him, and filed such statement in the office of the probate judge, as required by the statute (p. 4).

That March 6th, 1868, one Chase applied to one Downing, then probate judge, who on that day, with-

out any notice to Holliday or any one claiming under him, or without any hearing or determination of the rights of the parties, or any action instituted for that purpose, conveyed the premises to said Chase (p. 4).

That on the 17th day of April, A. D. 1878, the then probate judge, by deed of that date, reciting that it had been made to appear to him that the plaintiff, Richard E. Whitsitt, was the rightful owner by a regular chain of title from the Denver Town Company, etc., conveyed the premises to said plaintiff: that about the 22d day of April, 1880, Whitsitt leased to Meskow for one year and delivered possession, who on that same day entered and erected a house of the value of $1,000 (p. 5).

That the Union Depot Company, claiming under said Chase, are threatening to destroy and tear down said house, and oust the said Meskow, the other defendants confederating and assisting.

That neither Chase nor any one under whom he claimed, was ever in any manner the occupant of the premises, nor the owner of any improvements thereon (p. 6).

That defendants claim the deed of said Downing to Chase is conclusive evidence that at the date of the entry of said lands Chase was the rightful occupant of lots, or the *bona fide* owner of improvements thereon, and that inasmuch as neither said Whitsitt, nor any under whom he claims was at the date of the entry in actual occupancy of the said premises, plaintiffs can not be admitted to impeach the conveyance of said Downing to said Chase.

Whereas, plaintiffs claim and will insist under

the act of congress for the relief of the citizens of Denver, plaintiffs, by reason of such first actual occupancy of the premises, is lawfully entitled thereto, and that the said Union Depot Company hold the estate derived under the conveyance of said Downing to said Chase as trustee for said Richard E. Whitsitt; and that according to the true intent and meaning of the act of congress of May 28, 1864, the entry of said land by James Hall was in trust for the several use and benefit, not only of the then occupants of said land, and the *bona fide* owners of the improvements, according to their respective interests, and to the extent of their several and respective occupancy of and improvement upon the several lots in said town site, and no further, but also in trust for those who might afterwards, at any time, become the first rightful occupants of any of said lots, at that time unoccupied, or the *bona fide* owners of improvements on such lots:—all of which will be denied by plaintiffs.

Wherefore, this is a controversy arising under the laws of the United States.

That the premises exceed in value five hundred dollars, and the term of said Meskow exceeds in value five hundred dollars.

Prayer, that defendants be restrained from tearing down or destroying the house and improvements of plaintiffs; that the defendant, The Union Depot Company, be required to release and convey the premises to the plaintiffs, or that plaintiffs may have such further relief, or such other and different relief as to equity shall seem meet, etc.

General demurrer for want of equity, and bill dis-

missed (p. 13).

Other causes are assigned in the demurrer, to which it is not deemed necessary to refer.

The points upon which reliance is placed for the reversal of this decree are:

1. That the circuit court erred in sustaining the demurrer.

2. The circuit court erred in dismissing the plaintiff's bill.

3. The circuit court decreed and determined that although plaintiffs were the first occupants of the premises in controversy, and the first to erect improvements thereon, such occupancy and improvements having its inception subsequent to the entry of the town site, created no right in the plaintiffs.

4. The circuit court decreed that the deed of the probate judge to the plaintiff, Whitsitt, conferred no right upon the plaintiffs.

All the acts of congress and territorial statutes having reference to the matter in issue, are for convenience printed at length at the end of this brief.

I.

The bill presents a controversy arising under the laws of the United States, of which, therefore, the circuit court might entertain jurisdiction independent of the citizenship of the parties.

Act March 3, 1875, § 1.

II.

The plaintiffs being the first occupants of the lots are entitled to a conveyance thereof by virtue of such occupancy.

Prior to the passage of the pre-emption law of September 4, 1841, the congress had adopted the practice and rule of disposing of the public lands at public sale.

The same usage had been observed in respect to the disposition of lands which have been occupied, while still public, by towns and villages."*

The pre-emption law of September 4, 1841, which inaugurated as the policy of the government, the rule which has since prevailed of disposing of the public lands to actual occupants, expressly excepted from its operation lands, "within the limits of incorporated towns," "selected as the site for a city or towns," and "lands occupied for the purposes of trade, and not agriculture." 5 Stat., 453, § 10.

So that from that time forward the actual occupant of agricultural lands was entitled to a pre-emption at a specified acreage, while the settler upon

*See the act authorizing the survey and sale of the site of Cincinnati, 2 Stat. 352.

That of Detroit, 2 Stat. 398. That of Shawneetown, 2 Stat. 591; 3 Stat. 113. An act making further provision for settling the claims to land in the territory of Missouri. 2 Stat. 749. The act for the sub-division and sale of the tract of lands at the foot of the lower rapids of the Sandusky river, 3 Stat. 308. An act to authorize the appointment of a surveyor for the lands in the Northern part of the Mississippi territory, and the sale of certain lands therein, 3 Stat. 375. This act authorized the designation of ten sections for town sites, and the sale of the lots laid off therein at public auction.

An act authorizing the disposal of certain lots of public ground in the city of New Orleans, and the town of Mobile, 3 Stat. 465. An act respecting the surveying and sale of the public lands in the Alabama territory, 2 Stat. 466. This act also authorizes the reservation of ten sections for town sites, and the sub-division into lots and the sale of the lots.

An act providing for the sale of three several tracts of land in Tuscawara county, in the state of Ohio, and for other purposes, 4 Stat. 56.

town lands could obtain his title only by competition with all others at the public sales.

The act of May 13, 1844, (5 Stat. 657), was intended to correct this anomaly, as sufficiently appears from the first clause, "That whenever any portion of the the surveyed public lands have been or shall be settled upon and occupied as a town site, *and therefore not subject to entry under the existing pre-emption laws*, it shall be lawful * * * for the judges of the county court, * * to enter at the proper land office * * the land so settled upon and occupied."

The statute being intended as a supplement to the "existing pre-emption laws," is to be construed in connection with them, and unless the contrary appears, its benefits must be deemed to be extended to the same class of persons, to wit: actual occupants; and to the same extent, to-wit: the extent of their occupancy.

This conclusion, from the antecedent legislation, *in pari materia*, is supported by the letter of the statute.

The entry of the lands by the corporate authorities, or the judges of the county court, it is declared shall be made "in trust for the *several* use and bene-

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An act for laying off a town on Been river, in the state of Illinois, and for other purposes, 4 Stat. 331.

An act making provision for the sale and disposition of the public grounds in the cities of St. Augustine and Pensacola, and to reserve certain lots and buildings for public purposes, etc., 4 Stat. 550.

An act to establish a town at St. Marks, Florida, 664.

An act for laying off the towns of Fort Madison and Burlington in the county of Des Moines, and the towns of Bellview, Du Buque and Peru in the county of Du Buque, Wisconsin territory, and for other purposes, 5 Stat. 70.

fit of the *occupants* thereof, *according to their respective interests.*"

It is supposed that upon this clause of the statute if it stood alone, no two opinions could be indulged.

But the statute in another part provides that the entry shall be made in legal subdivisions, etc., and next after the clause above quoted, proceeds to declare that "the execution of which trust as to the disposal of the lots in such town and the proceeds of the sales thereof to be conducted under such rules and regulations as may be prescribed by the legislative authority of the state or territory in which the same is situate."

From these provisions it has been thought that the clause last cited was intended to create a trust separate from and additional to that, for the several use and benefit of the occupants, declared in the previous language.

Cash's Appeal, 6 Mich. 193.
City of Denver vs. Kent, 1 Colo. 336.

It is submitted that the resolution in these cases is opposed both to the letter and the spirit of the act.

1. The language of that clause out of which the second trust, to wit: for the sale of the unoccupied lots is derived, is "the execution of *which* trust as to the disposal of the lots in such town, and the proceeds of the sales thereof to be conducted under such rules and regulations as may be prescribed by the legislative authority of the state or territory."

The word of reference "*which*" shows that the trust in respect to which the local legislature is au-

thorized to prescribe rules, is the same before declared, to wit: that "for the *several* use and benefit of the occupants, according to their respective interests."

2. The provision relied upon to enlarge the trust, is subsidiary to the principal object of the statute. It relates solely to the ways and means of distributing the bounty of the government. To give it effect to enlarge the number of the beneficiaries, is to violate the maxim *Accessoriam non ducit principale.*

3. If from the words "as to the disposal of the lots in such town and the proceeds of the sales thereof," we infer that some portion of the lots are to be exposed for the competition of all comers, we must indulge the same conclusion as to all, for it clearly refers to all *the lots*, in every town site entered under the statute.

The construction given by the learned court of Michigan, is at variance with the spirit and the general policy of the law.

The statute was contrived to extend to the inhabitants of towns upon the frontier, the same privileges before extended to the settlers upon agricultural lands.

There are localities designated and marked by nature for the centers of population; localities which were the rallying points and bases of operation and supply, of our armies and those of other races,—both savage and civilized,—before us, to which the first occupants in peace congregated as inevitably as water seeks a level.

By the pre-emption law of 1841, and always before that, congress had invariably reserved to the government the increase in the value of the public lands,

occasioned by the formation of settlements at such localities.

Is it conceivable that it was the purpose of the act of 1844 to transfer these benefits to the first handful of settlers who might congregate at the frontier posts?

The act of 1841 contained stringent provisions against engrossing the public domain for speculation; it required the pre-emptioner to make oath that he had not settled upon the land "to sell the same on speculation, but in good faith to appropriate it, to his or her own exclusive use and benefit."

This provision is retained to this day.

Is it conceivable that by the act of 1844, it was intended to pave the way for speculation in town lots; while discouraging that in agricultural lands?

What special merit in the first settler or post trader, that he and his retinue of dependents should engross the whole of three hundred and twenty acres?

What special merit is there in associations like the Denver Town Company, to command the bounty of congress?

At the date of the entry of these lands, it is probable that by far the larger part of the six hundred and forty acres, entered by the county judge, was virgin prairie.

The actual occupants were enjoying all that the purposes of their residence or trade demanded; is it consistent with the language, or the legislation of congress, that they should have more than this?

That those arriving before the 5th day of May,

1865, should have all; and those arriving after that day none.

But it is said in the Michigan case, that the unoccupied lots are to be sold, and the proceeds invested for the public purposes of the community as such; the erection of public buildings, the support of public schools, "or any other general purpose that will conduce to the interest of the community as such"—are suggested in the opinion of Mr. Justice Belford, in the case in Colorado.

Here again those who contend for the idea of a double trust, supply the supposed omission of the statute by their own inventions.

If the statute does in truth create a double trust, then the first only is for the benefit of occupants,—and is restricted to their actual possessions.

As to the second, the beneficaries are to be nominated by the local legislature. The legislature may dispose of the proceeds of sales for the benefit of the community of the town within which the lots lie; or for the benefit of some other similiar community; or for the benefit of the state at large; or they may donate them to any person or persons whomsoever, as their wisdom or caprice may suggest.

And this, in effect, is conceded by the suggestion that the proceeds of the unoccupied lots may be appropriated to permanent public improvements; for these, in the nature of things, inure not only to the inhabitants of the town at the date of the entry, but to all who come after them in perpetuity.

There is no necessity to accept the construction adopted by the court below in order to give effect to the clause in respect to the disposal of the lots, and

the disposition of the proceeds of the sales thereof.

The lands are not donated by congress to the county judges; nor was it the intention that he should donate them to the occupants.

Each must pay his just share of the cost of the land entry; and of the execution of the trust; he obtains his title for a price. This is nothing more nor less than a sale; and these, we submit, are the sales mentioned in the clause in question.

When this case was here upon a former appeal (which was dismissed for want of affidavits of value) the positions relied upon by counsel for appellee were presented in argument, and anticipating that the same positions will be reiterated it is thought proper to notice them here:

It was argued that the decree of the circuit court was in obedienoe to an established course of decision of the state court, constituting a rule of property.

The cases following were cited to this proposition:

Cook vs. Rice, 2 Colo. 135.
Clayton vs. Spencer, 2 Colo. 380.
Adams vs. Binkley, 4 Colo. 248.

But in each of these cases there was an actual occupancy and *bona fide* improvement at the date of the entry, May 6, 1865.

Thus in Cook vs. Rice, it is said in the opinion of the court "The evidence *clearly establishes* * * *that one John Dalton entered upon this land in* 1860, erected a house or cabin, and occupied it with his family until 1863, he then conveyed it to Isaac N. Campbell, who entered into occupation and resided with his family until April, 1865.

Campbell placed some additional improvement on the property, and on the 7th day of June, 1866, conveyed these lots to Rice, who it appears has been in possession ever since. * * There is nothing in the record to show that the complainant ever was in the occupation of the property, or ever placed any improvements thereon."

2 Colo. 135.

In Clayton vs. Spencer, it is declared as the conclusion of the court "The evidence shows that Mary McLaughlin, through whom the appellee claims title, was in the *actual occupancy* of this property prior to and at the date of the entry, and that her possession continued until March, 1867. * * *It does not appear that Clayton or his grantors were ever in actual occupancy* of these lots."

2 Colo. 380.

In Adams vs. Binkley, the court say: "The town site of Rosita was entered March 22, 1876. The evidence shows that on the 16th of October, 1875, the premises were unimproved and unoccupied. That at or about the date Adams *entered upon and took actual possession* of the same, erected a house and occupied the same continuously from November 20, 1875, until May 1, 1877. * * Binkley's claim is based on a deed from Bradbury. * * Bradbury does not appear to have ever occupied or improved the premises, nor does Binkley after his purchase from Bradley."

4 Colo. 248.

It is manifest, therefore, that these cases have no bearing at all upon the true resolution of the question here presented.

In each of these cases there was clear proof of an actual occupancy, and *bona fide* improvement at the date of the entry in the successful party.

In this case the defendant, by the confession of his demurrer, never had either. The possession lay vacant until the plaintiff's entry in 1879.

Our contention that as to the lots vacant at the date of the entry the trust remained in abeyance until by a subsequent actual occupancy the beneficiary should be appointed, has never been made, except in The City vs. Kent, before cited.

It is true that in Cofield vs. McClellan, 16 Wall. 333, Mr. Justice Hunt says that "Those in possession of the lands when the entry shall be made by the probate judge are the persons for whom he holds the land in trust, and to whom he is to make the respective deeds."

But in that case, as in other cases, the evidence was found to be "strong and quite convincing" that "at the date of the entry the defendant was in the actual possession * * with valuable improvements made therein."

As appears by the reporter's statement of the case, the plaintiff claimed "a prior settlement by one Preston in 1859, a conveyance by Preston to Hall, several intermediate conveyances by which the lot came to Bates, a conveyance by Bates to the complainant." But there was no pretense that the plaintiff had ever presented the statement of his claim

to the probate judge as required by the territorial legislature.

The question was therefore two-fold, to wit: 1st. Was the plaintiff the first occupant? 2nd. What was the effect of his failure to present the statement of his claim to the probate judge, within the time limited by statute.

It is manifest that the resolution of these questions does not involve those presented in the present case.

The remarks of Mr. Justice Hunt were therefore mere *dicta*, and in the language of Marshall, C. J., in Cohen vs. Virginia, "ought not to control the judgment in another suit, when the very point is presented for decision."

6 Wh. 399.

The "rule of property" for which our adversaries contend depends, therefore, on the decision of one state court; the decision of one territorial court divided; and the dictum of one justice of this court.

Upon what principle shall these errors of the courts of Michigan and Colorado control the interpretation of federal statutes for other states and territories?

And what shall be said of this rule of property when this court shall hereafter be called upon to apply the same in controversies between the inhabitants of the state of Nevada, where, so long ago as the year 1872, it was held that in order to entitle one to the benefits of the act of congress he must be an *actual* occupant.

Tredway vs. Wilder, 8 Nev. 98.

And that the act of congress was intended for the benefit and protection of the actual citizens of the town, and that it was not the intention of congress that unoccupied lands within the town site at the time of the entry should become the property of the citizens of the town.

III.

The plaintiffs are entitled to relief by virtue of the conveyance of the probate judge of April 17, A. D. 1878, if not by virtue of their prior occupancy.

The bill avers and the demurrer admits, that the lots in controversy were vacant and unimproved at the date of the entry.

If the interpretation given to the statute by the supreme court of Colorado in The City vs. Kent, shall prevail in this court, then as to these premises, the legislature had absolute power of disposal.

They might devote them to public use, or allot them to any private person, supposed to be deserving in the premises.

This they attempted to do by the act of February 8, A. D. 1872.

This act was passed to supply the defects in the previous legislation of the territory, supposed to have been developed by the decision of the supreme court in The City vs. Kent; and to conform the law touching the disposition of the unsettled lots to the view expressed in the majority opinion in that case.

The provisions of section 9, which we invoke to support the conveyance of the probate judge, of April 17, A. D. 1878, were in recognition of the

equities of the many persons who had, in good faith, purchased the supposed title of the founders of the town, and by accident or their own default, had been prevented from receiving the conveyance of the probate judge.

The prior collusive conveyance to Chase did not obstruct the legislative power in this respect;—being in confessed violation of the regulations prescribed by the territorial laws of 1864 (§ § 4, 5 and 8), it was void by the letter of the act of congress.

All such conveyances will on bill in equity by the grantee of the probate judge, under the provisions of the act of the legislature of Colorado of February 8, 1872, be swept out of the way, as expressly held by the supreme court of Colorado in Downing vs. Bartels, (M. S.)

IV.

If by reason of either actual prior occupancy, or the conveyance of the probate judge of April 17, 1878, the plaintiffs are entitled to the premises, the defendant must be deemed to hold as a trustee, and may be compelled by decree to convey.

Silver vs. Ladd, 7 Wall 228.

Clayton vs. Spencer, 2 Colo. 381.

V.

The lapse of time is no bar to the plaintiffs' equity.

1. Because until February, 1874, there was no statutory limitation in Colorado, upon an action to recover real property.

Acts Colorado, 1874, p. 177.

2. The plaintiffs are entitled to relief, if at all, solely by reason of their first actual occupancy; or by reason of the conveyance of the probate judge, of April 17, 1878.

Either of these events is sufficiently recent to exempt the case from the statutory bar, or the equitable maxim against stale claims.

E. T. WELLS,
for Plaintiff in Error.

son of their first actual occupancy; or by reason of the conveyance of the Probate Judge, of April 17, 1878.

Either of these events is sufficiently recent to exempt the case from the statutory bar, or the equitable maxim against stale claims.

AMOS STECK,
WELLS, SMITH & MACON,
For Plaintiffs in Error.

STATUTES

Referred to in the foregoing Brief.

AN ACT for the Relief of the Citizens of Towns upon the Lands of the United States, under certain circumstances.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled:

That whenever any portion of the surveyed public lands has been or shall be settled upon and occupied as a town site, and therefore not subject to entry under the existing pre-emption laws, it shall be lawful, in case such town or place shall be incorporated, for the corporate authorities thereof, and, if not incorporated, for the judges of the county court for the county in which such town may be situated, to enter, at the proper land office, and at the minimum price, the land so settled, and occupied, in trust, for the several use and benefit, of the occupants thereof, according to their respective interests; the execution of which trust, as to the disposal of the lots in such town, and the proceeds of the sales thereof, to be conducted under such rules and regulations as may be prescribed by the legislative authority of the State or Territory in which the same is situated: *Provided*, that the entry of the land intended by this act be made prior to the commencement of the public sale of the body of land in which it is included, and that the entry shall include only such land as is actually occupied by the town, and be made in conformity to the legal subdivisions of the public lands authorized by the act of twenty fourth April, one thousand eight hundred and twenty, and shall not in the whole exceed three hundred and twenty acres; *And Provided, also*, That any act of said trustees, not made in conformity to the rules and regulations herein alluded to, shall

be void and of none effect; *And Provided, also*, that the corporate authorities of the town of Weston, in the County of Platte, State of Missouri, or the county court of Platte county, in said State, shall be allowed twelve months, from and after the passage of this act, to enter at the proper land office, the lands upon which said town is situate.

Approved May 23, 1844.

(13 Stat., 94.)

AN ACT for the Relief of the Citizens of Denver, in the Territory of Colorado.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled:

That the provisions of an act of Congress entitled "An act for the relief of the citizens of towns upon the lands of the United States, under certain circumstances," approved May 23, 1844, be so extended as to authorize the probate judge of Arapahoe county, in the Territory of Colorado, to enter at the minimum price, in trust for the several use and benefit of the rightful occupants of said land, and the bona fide owners of the improvements thereon, according to their respective interests, the following legal sub-divisions of land, or such portions thereof, as are settled and actually occupied, for town purposes by the town of Denver aforesaid, to-wit: Section number thirty-three, and the west half of section number thirty-four, in township number three south of range number sixty-eight west of the sixth principal meridian: *Provided, however*, That there shall be reserved from such sale and entry, such blocks or lots in the town of Denver as may be necessary for government purposes, to be designated by the commissioner of the general land office.

SEC. 2. *And be it further enacted*, That in all respects except as herein modified, the execution of the foregoing provisions shall be controlled by the provisions of said act of twenty-third May, eighteen hundred and forty-four, and the rules and regulations of the commissioner of the general land office.

Approved May 28, 1864.

(4 Stat., 659.)

AN ACT Prescribing Rules and Regulations for the execution of the Trust arising under the Act of Congress, entitled "An Act for the Relief of Citizens of Towns upon lands of the United States under certain circumstances."

Be it [enacted] ordained by the Council and House of Representatives of Colorado Territory:

SEC. 1. When the corporate authorities of any town, or the judge or judges of the county court, for any county in this Territory, in which any town may be situated, shall have entered at the proper land office, the land or any part of the land settled and occupied as the site of such town, pursuant to, and by virtue of the provisions of the act of Congress, entitled "An act for the relief of citizens of towns, upon lands of the United States, under certain circumstances," passed May 23, A. D. 1844, and any amendments that may be made thereto, it shall be the duty of such corporate authorities, or judge, or judges, (as the case may be), and they are hereby directed and required to dispose of and convey the title to such land, or to the several blocks, lots, parcels, or shares thereof, to the persons hereinafter described, and in the manner hereinafter specified.

SEC. 2. Any such corporate authorities, or judge, or judges, holding the title of such lands in trust, as declared in the said act of Congress, shall be a good and sufficient deed of conveyance, to grant and convey the title to each and every block, lot, share, or parcel of the same; to the person or persons who shall have, possess, or be entitled to the possession or occupancy thereof, according to his, her, or their several and respective rights or interest in the same, as they existed in law or equity, at the time of the entry of such lands, or to his, her or their heirs or assigns, and when any share or parcel of such lands shall be occupied or possessed by one or more persons claiming the same by grant, lease or sale from one or more other persons, the respective rights and interests of such persons in relation to each other in the same, shall not be changed or impaired by any such conveyance. Every deed to be made by such corporate authorities, or by such judge or judges, pursuant to the provisions of this act, shall be so executed and acknowledged as to admit the same to be recorded.

SEC. 3. Within thirty days after the entry of any such lands, the corporate authorities, or judge or judges entering the same, shall give public notice of such entry, by posting notice thereof in at least three public places in such town, and by publishing such notice in a newspaper printed and published in the county in which such town shall be situated, or, in case there shall not be any newspaper published in such county, then in some newspaper printed and published nearest to such town in this Territory. Such notice shall be published once in each week, for at least three successive weeks, and shall contain an accurate description of the lands so entered, as the same is stated in the certificate of entry, or duplicate receipt for the purchase money thereof, given by the land officers at the time of such entry.

SEC. 4. Each and every person or association, or company of persons, claiming to be an occupant or occupants, or to have possession, or to be entitled to the occupancy or possession of such lands, or to any lot, block, share or parcel thereof, shall within ninety days after the first publication of such notice, in person, or by his, her or their duly authorized agent, or attorney, sign a statement in writing, containing an accurate description of the particular parcel or parts of land, in which he, she or they claim to have an interest, and the specific right, interest or estate therein, which he, she or they claim to be entitled to receive, and deliver the same to or into the office of such corporate authorities, judge or judges, and all persons failing to sign and deliver such statement, within the time specified in this section, shall be forever barred the right of claiming or recovering such lands, or any interest or estate therein, or in any part, parcel or share thereof, in any court of law or equity.

SEC. 5. In case there shall be adverse claimants to such lands, or to any part, parcel or share thereof, either party may bring a suit in chancery against the adverse claimant or claimants, in the district court of the judicial district, or in any court of competent jurisdiction, and in the county in which the lands shall be situated, or in any county to which the county in which such lands shall be situated, is attached for judicial purposes: *Provided always*, That no judge of the district court, or probate judge, who has been an adverse claimant, directly or indirectly, of any portion of the lands embraced within such town, or who is a party to any action brought to determine the right to a con-

veyance of any portion of the lands within such town, shall entertain, hear or determine any proceeding, interlocutory or final, in any action brought to determine any such claims, by or between any parties whomsoever, but in all such cases, if the cause or proceeding shall be pending in a district court, the judge thereof shall order all papers, with a transcript of the record in the cause, to be transmitted to another judicial district, as in cases of change of venue, and if the cause or proceeding shall be pending in a probate court, the judge thereof shall order all papers with a transcript of the record, to be transmitted to the probate court, of the nearest county, where the cases complained of do not exist, as in cases of change of venue, and the cause shall proceed in the court to which the same be removed, in the same manner as if originally instituted in that court; *Provided, also*, that the laws applicable to a change of venue, shall apply to actions brought under this act; *And, Provided, also*, That nothing in this act shall prevent the district judge of the district in which any such lands are situated, from executing any and all conveyances of such lands, pursuant to the determination of such action. Suits brought under the provisions of this act, shall be brought against adverse claimants as defendants, and it shall not be necessary to make the judge or corporate authorities holding the trust, parties thereto, except as provided in section nine of this act. The complainant's bill shall show what interest or estate in the lands in controversy the complainant claims, and defendant shall answer such bill as in cases of chancery. Pleadings and proceedings in such actions shall be as in cases in chancery, except that oral testimony may be introduced upon the trial of the cause.

SEC. 6. Upon the trial of any such action, either party may give, in evidence, the statement mentioned in the fourth section of this act, deposited by the other, or by the person under whom he or she claims, with the corporate authorities, or judge or judges, holding the title to the lands in controversy therein, and the person or persons who shall have first acquired the right to the possession or occupancy of such lands, either in person or by agent, attorney, servant or tenant, or those claiming under him, her or them, shall in any such action be deemed to have the prior and permanent right to such lands, and any rule of law or equity which would prevent a determination in accordance with such private right, shall be disregarded in such action.

Upon the trial of any such action, the evidence of the witnesses, if not in the form of depositions, shall be reduced to writing, and being certified by the presiding judge, shall be filed with the papers in the cause. *Provided*, That nothing in this section shall be so construed as to recognize the right of any person or persons, who have virtually abandoned any land held as a town site, to any title therein.

SEC. 7. Appeals and writs of error shall be allowed, and may be taken and prosecuted from the judgements or decrees of the courts, in proceedings under this act, to the supreme court, as in other cases.

SEC. 8. In case suits shall not be brought, as provided in this act, for the purpose of settling or determining any controversy between adverse claimants to any such lands, within sixty days after the expiration of the time for filing the statement as provided in section four of this act, if the title to such land shall be held by any judge, it shall be the duty of such judge to summon the adverse claimants to appear before him, at a time and place to be mentioned in such notice, and which place shall be within the county in which such land shall be situated, and make their proof and allegations in reference to such adverse claims, at the time and place of the return of such summons. If the same shall have been served as provided in this act, the judges shall, if the parties appear, proceed to hear their proof and allegations, and shall thereupon determine in writing, the controversy between them. Upon such hearing, the statements of the parties respectively deposited with such judge, as required by the fourth section of this act, shall stand for their pleadings, and neither party may use in evidence the statement by the other, or by the person under whom he or she claims. The evidence of the witnesses sworn upon such trial, shall be reduced to writing, and any witness who shall, upon such hearing, wilfully and knowingly testify falsely, shall be deemed guilty of perjury. Any such judge or justice of the peace, may issue subpœnas to compel the attendance of witnesses upon such hearing, and any person served with such subpœna shall be deemed guilty of contempt of said judge, and may be attached to answer such contempt, and to testify in the case. There shall be no postponement in the hearing of such cases, except for cause. The summons issued by the judge, and all subpœnas issued in such cases,

shall be directed and served in the same manner as in actions at law, except that such summons, in case where the person named therein cannot be found, may be served upon the agent or attorney, who shall have filed the statement mentioned in section four of this act. The fees of the officers and witnesses in such cases, shall be the same as for like services in actions of court of record. Either party in any such case may appeal from the determination of any such judge therein, to the supreme court, in the same manner that a party may appeal from any judgment in an action at law in the district court. If an appeal shall be allowed, the judge shall transmit to the clerk of the supreme court, a transcript of the statements standing for the pleadings in the case, the evidence and the determination of the judge in writing.

In case any party lawfully summoned to appear before such judge, as mentioned in this act, shall fail to appear at the time and place mentioned in the summons, he shall be deemed to have waived and relinquished all right, title and interest and estate in the said lands so in controversy, and each and every piece, parcel and share thereof, and shall be forever barred from asserting or claiming any right, title, interest or estate therein.

SEC. 9. If in a case mentioned in section eight of this act, the title to any such lands shall be held by the corporate authorities of any town, such corporate authorities may bring an action in the district court of the judicial district, and in the county in which the lands in controversy shall be situated, or in some county to which such county shall be attached for judicial purposes, to settle and determine such controversy. Such suit shall be commenced on the chancery side of the court, by bill, in the nature of a bill in [of] interpleader, which bill shall set forth, a description of the lands claimed by adverse claimants, and the character and extent of the right or interest or estate therein, claimed by each, as the same shall appear by the statements deposited with such authorities, pursuant to section four of this act, and the names of all adverse claimants who shall have filed such statements, and shall pray that the several adverse claimants shall be required to appear in such court and prosecute such claim or be forever barred therefrom. Any claimant to such land, who shall fail to appear and answer such bill, and thus prosecute his claim to the land described in such bill, pursuant to the summons in such case and the practice of the district court, shall be

forever barred of the right to assert any claim or title to the lands in controversy, adverse to the other claimants, their representatives or assigns, elsewhere, or in any court whatsoever. If the adverse claimants to the lands described in the bill, in such case shall appear, they shall respectively answer such bill, and either disclaim any right, title or interest or estate in the land described, or set forth the nature, character and extent of the title, interest or estate which he, she or they respectively claim therein. Issues between such adverse claimants, made by their answers to such bill, may be brought to a hearing, and shall be determined, and such determination may be received by the supreme court, in the same manner and by the same rules of law and evidence, as in other cases mentioned in sections five, six, and seven of this act.

SEC. 10. Whenever any summons issued under the provisions of this act, cannot be served upon the person or persons named therein, nor upon the agent or attorney of such person or persons, who shall have filed a statement, as required in the fourth section of this act, and the complainant or judge, as the case may be, shall file an affidavit, as provided in the eighth section of "an act concerning practice in chancery," approved Oct. 4, 1861, it shall be lawful for the judge, or the clerk of the court, as the case may be, to cause publication to be made, as provided in said section of said act, concerning practice in chancery, and when such publication shall have been made, the cause shall proceed as if the parties had been personally served with process.

SEC. 11. As soon as may be after the expiration of sixty days from the first publication of the notice, mentioned in the third section of this act, the corporate authorities, judge or judges holding the title to the lands described in such notice, shall make a true statement in writing, containing a true account of all monies, by him or them expended in the acquisition of the title, and the administration or execution of the trust to that time, including the monies paid by him or them for the purchase of said lands, all necessary travelling expenses, all monies paid for publishing and posting such notices, and for proof thereof, and for all other necessary and proper expenses incident to such trust, and also a true account of his or their charges for time and services, employed in the business of such trust, to that time. The whole amount of such account for monies and reason-

able charges for compensation, shall be a charge upon the lands so held in trust, in favor of the trustee, and shall be paid by the several claimants entitled to such lands, in proportion to the several quantities or shares thereof to which they may be respectively entitled.

SEC. 12. Before the corporate authorities, or judge or judges holding any such lands in trust, as aforesaid, shall be required to execute, acknowledge or deliver any deed of conveyance thereof, as hereinbefore mentioned, to any person or persons claiming to be entitled to such deed, such person or persons shall pay or tender to him or them the sum of money chargable on the part thereof, to be conveyed by such deed, according to the statement or account mentioned in the eleventh section of this act, the amount to be determined by the proportion which the quantity of the land to be described in such deed, shall bear to the whole quantity of the land of which it is a part, compared with the whole amount thus charged upon the whole quantity of land, together with the interest on each of the money items of such account, at the rate of twenty-five per centum per annum, from the time when the same account, and also such further sums as shall be a reasonable compensation for preparing, executing and acknowledging such deed, and the fees of the officers taking the acknowledgment thereof: *Provided,* That no mayor or judge holding such lands in trust, shall be entitled to receive more than fifty cents for a deed containing the description of one lot, block or parcel of land, nor more than five cents for each additional lot, block or parcel of land described in such deed, and no clerk of any incorporated town, shall be entitled to receive more than ten cents for attesting with the seal of such town, the execution of any deed by the corporate authorities of such town.

Sec. 13. After the expiration of ninety days from the time of the first publication of the notice mentioned in the third section of this act, the corporate authorities, or judge or judges, holding the title to the lands described therein, shall, upon a reasonable demand or request, and upon the payment or tender to him or them of the moneys mentioned in the twelfth section of this act, execute, acknowledge and deliver to each and every claimant, or association, or company of claimants to such lands, or any lot, block, parcel or share thereof, a deed of conveyance thereof, as prescribed in the second section of this act, and according to the

statement made and deposited by him or them, pursuant to the fourth section of this act: *Provided, however*, That no such deed of conveyance shall be acknowledged or delivered for any part, lot, block, or share of such lands, to which there shall be adverse or contesting claimants, until the controversy thereon shall have been settled or determined, in the manner hereinbefore prescribed, and whenever any such controversy shall have been so settled and determined, the corporate authorities, or judge or judges, shall, upon the like demand, or request, and the like payment or tender, and by the like deed of conveyance, convey the lands or interest or share therein, the right to which shall have been thus ascertained, to the person or persons thereby determined to be enti tled to the same.

Sec. 14. When a town site is entered, under the act of Congress mentioned in this act, by the corporate authorities of any incorporated town, deeds shall be made by the mayor or other chief officer of such town, for the time being, under the corporate seal of such incorporated town, and attested by the clerk or register of such town, and if such incorporated town have no seal, then under the scrawl or private seal of said mayor or other chief officer, attested by the clerk or register, as aforesaid. When the land is entered by the judge or judges of the county court, deeds shall be signed by such judge or judges, under his or their private seal or scrawl.

Sec. 15. In case any judge who shall have entered any such land under the provisions of the said act of Congress, and thus become the sole trustee thereof, shall be possessed of or entitled to the same, or any part, lot, block or share thereof, according to and by virtue of the provisions of this act, and his claim or right shall not be claimed adversely to him by any person; he shall be, and be deemed to be seized and possessed of the title thereto, and the estate therein, to his own use, in fee simple, absolute, free, and discharged of such trust, and no conveyance other than the patent of the lands, including the same shall be necessary to perfect his absolute title thereto.

In case such land or interest, or share in such land, so claimed by such judge, shall be claimed by any other person or persons adversely to him, the conflicting claims between him and such other person shall be adjusted by settlement, or action, as hereinbefore prescribed, and in such case of action at law, the issues

therein shall be tried before some judge who shall be disinterested, and possessed of competent jurisdiction to hold court for the trial of and to render judgment in such action.

SEC. 16. For all the purposes of determining the rights of adverse claimants to any lands so entered, pursuant to the said act of Congress, the corporate authorities, or judge or judges hereinbefore mentioned, shall be deemed to possess and hold the title to the lands so entered in such trust, from the time of the entry thereof.

SEC. 17. The costs in the actions mentioned in this act, and in proceeding before the judge, as prescribed in the eighth section of this act, shall [be] regulated and recoverable as in other civil actions.

SEC. 18. If the title to any such lands shall be vested in any judge, such judge shall convey to the people, or to the legal authorities, the land used or laid out by the town authorities, as streets, lanes, avenues, parks, commons and public grounds, within such time as is herein prescribed for making conveyances to individuals.

SEC. 19. Whenever the title to such lands shall be held by the corporate authorities of any town, all lands used, laid out, or designated for public use by such corporate authorities, as streets, lanes, avenues, alleys, parks, commons and public grounds, shall rest in and be held by the corporation absolutely, and shall not be claimed adversely by any person or persons whomsoever, and it shall not be necessary to execute any conveyance for the same, to the corporation or the people of such town.

SEC. 20. Each and every person and association and company of persons who shall be entitled to any lots, pieces or parcels of land, held in trust under the act of Congress aforesaid, by the authorities of any incorporated town, and respecting which there shall be no controversy, shall, within three months after the expiration of the time mentioned for filing statements, pay or tender to the corporate authorities, holding such lands in trust, the sum of money chargeable upon such lot, pieces or parcels of land, together with the interest thereon, and fees for preparing, executing and acknowledging a deed to such lands, and in case of a failure so to do, such person or persons shall be deemed to have relinquished all right, title and interest and estate in such

lands, and each and every piece, parcel and share thereof, and shall be forever barred the right of asserting or claiming any right, title interest, or estate therein, and such incorporated authorities, shall thereafter be and be deemed to be seized and possessed of the title thereto, to their own use in fee simple absolute, free and discharged of such trust, and no conveyance other than the patent of the lands including the same, shall be necessary to perfect their absolute title thereto, and any person or persons who shall be entitled to any lots, parcels or pieces of land, held in trust by any incorporated authorities, as aforesaid, and respecting which there has been adverse claimants, shall, within three months after the final determination of any action between the adverse claimants, respecting such lands, pay or tender to such incorporated authorities, holding such lands in trust, the sum of money chargeable upon such lots, pieces or parcels of land, together with the interest and fees for preparing, executing and acknowledging a deed to such lands, and in case of a failure so to do, such person or persons shall be deemed to have relinquished all right, title and interest and estate in such lands, and each and every piece, parcel and share thereof, and shall be forever barred the right of asserting or claiming any right, title interest, or estate therein, and such corporate authorities shall be, and be deemed to be seized and possessed of the title thereto, to their own use in fee simple absolute, free and discharged of such trust and no conveyance other than the patent to the lands including the same, shall be deemed necessary to perfect their absolute title thereto.

SEC. 21. Probate judges are hereby declared to be county judges for the purpose of executing the trust mentioned in said act of Congress.

SEC. 22. This act to take effect and be in force from and after its passage.

Approved March 11th, 1864.

(Acts Colorado, 1864, p. 139.)

AN ACT to Provide for the further Execution of the Trust relating to the Town Site of the City of Denver, and to regulate the same.

Be it enacted by the Council and House of Representatives of Colorado Territory:

SEC. 1. That the Probate Judge of the County of Arapahoe and Territory of Colorado, shall proceed and make, or cause to be made as soon as practicable after the passage of this act, a list of all town lots or parcels of land embraced within section number thirty-three (33), and the west half of section number thirty-four (34), in township number three (3), south of range number sixty-eight west in said county, to which no person, association of persons, or body corporate, except the City of Denver, filed any claim, with the Probate Judge of said county on or before the 9th day of August, A. D. 1865: *Provided*, That said list shall not embrace such lots and lands as have since the date last aforesaid been deeded in good faith by any Probate Judge of said county to any rightful owner thereof, holding the same by proper chain of title under and from the Denver Town Company. * * * * * * * * * *

SEC. 2. The Probate Judge of said county shall immediately, upon the preparation of said list, proceed and advertise said lots and lands for sale, in some newspaper published in said city, for sixty days, at public vendue, to the highest and best bidder for cash in hand, and shall, upon the day and at the time and place mentioned in such advertisement, proceed and sell the same to the highest and best bidder therefor for cash.

SEC. 3. If any person or persons shall, prior to the time of said sale, file his, her, or their petition in writing, before said judge, showing that he, she, or they, have, at any time, either before or since the entry of said lands, acquired an interest in any lot or lands so listed as aforesaid, by purchase or occupation, in good faith, without actual notice of the legal defects to the title thereof, and that he, she, or they, had also, prior to the 25th day of January, 1872, improved such lot, lots, or lands, by the erection of a dwelling house thereon, setting forth the particular facts in relation thereto, and the time at which such rights occurred and facts transpired, it shall be the duty of said

judge to set the matters and allegations of such petition down for hearing; and if the petitioner or City Attorney of said city requests it, the said judge shall impanel a jury of six men, who shall take an oath to faithfully inquire into the facts alleged in the petition, and a true verdict give as to their truth; and said jurors shall have the same qualifications and powers, and shall be impanelled in the same manner, as respects challenges, and in other respects as in civil cases; and, if upon the trial, such jury, or the said court, in case no jury is demanded as aforesaid, shall find the facts stated in such petition to be true, and that the petitioner or petitioners have erected a dwelling house on such lot or lots, it shall be the duty of said judge to withdraw such lot, lots or lands from said list, and upon the payment to him of the cost of such trial, and his reasonable fees and expenses, shall execute and deliver to such petitioner or petitioners a deed or deeds, granting and conveying to him, her or them the fee simple title to any such lots or lands. The trial in any such case as is contemplated by this section of this act, shall be final and conclusive on the City of Denver, and on all parties, unless for good cause, or because the same is manifestly unreasonable, or contrary to evidence, the court shall set aside the verdict of the jury, but no more than two new trials shall be allowed in any one case.

SEC. 4. The said Probate Judge shall make, execute and deliver to the purchaser or purchasers of any such lots or lands sold by virtue of this act, a deed or deeds, granting and conveying to him, her or them, the fee simple title therein, which deed shall vest in the grantee thereof all the title therein; and shall authorize and empower him, her or them, to bring and maintain all such suits in ejectment or other suits and proceedings as may be necessary for the cancelling of any deed or deeds theretofore made, wrongfully or fraudulently, by any former Probate Judge.

SEC. 5. Said Probate Judge shall make or cause to be made and kept, a record of all or any such lots or lands so sold, showing the advertisement. the parcels of lands, or lots sold, the price paid, and the persons to whom sold and deeded.

SEC. 6. The said Probate Judge shall give ten (10) days previous notice, in some daily newspaper published in said city, of the time when he will commence making said list of lots and lands, and shall sit from day to day, for the purpose of preparing the same, at which the City Attorney or any citizen, on the part of the city, shall have the right to be present, and may sug-

gest to said Judge, by petition, any lots or lands that may have been omitted, and that any filing or filings theretofore made, which may appear to have been made on or before the 9th day of August, 1865, were in fact made after that time, and it shall be the duty of said Probate Judge to inquire into the same by such competent testimony as may be produced before him in that behalf, and if he shall be of opinion that such lots or lands have been wrongfully omitted, he shall thereupon include the same in such list, and proceed to advertise and sell the same.

SEC. 7. All moneys arising from any sale of said lots, or lands, shall be paid over by the purchaser to the treasurer of said city of Denver, for the use and benefit of the public schools of said city, and shall be distributed to the different boards of school directors of said city, as the city council may direct.

SEC 8. The city council shall audit and allow any reasonable bill or bills of said Probate Judge for making said list of lots, and for making said sales, and the expenses thereof, and shall order the same paid out of any money received as aforesaid.

SEC. 9. The owner or owners of any lots, or lands within the limits aforesaid, to which deeds have heretofore been made by any Probate Judge of said county, who may be the rightful owners thereof, holding the same by proper chain of title, under and from the Denver Town Company, may at any time hereafter apply to said Probate Judge for a deed, or deeds, to the same lots, or lands, and on such application, and the payment to him of his reasonable fees and expenses of executing the same, it shall be the duty of said Judge to execute and deliver a deed, or deeds, to such owner or owners, granting and conveying to such owner or owners the fee simple, in and to such lots and lands, notwithstanding the said claimants or their assignors may have failed to file their claim or claims to said lots or lands on or before the 9th day of August, 1865, as required by law, and such deed or deeds so as aforesaid issued by said Judge, shall vest in the grantee or grantees thereof the legal title in fee simple to said lots or lands.

SEC. 10. All acts or parts of acts inconsistent with this act, insofar as they are inconsistent, are hereby repealed.

SEC. 11. This act shall be in force and take effect from and after its passage.

Approved, February 8th, 1872.

(Acts Colorado, 1872, p. 191.)

122-363

—IN THE—

SUPREME COURT

—OF THE—

UNITED STATES.

EMMA C. WHITSITT, Sole Devisee and Heir at Law of RICHARD E. WHITSITT, deceased, *Appellant*,

vs.

THE UNION DEPOT AND RAILROAD COMPANY, *Appellees*.

ADDITIONAL BRIEF ON THE PART OF APPELLANT.

The contention of appellant in this case is that under the act of congress of May 23d, 1844, for the relief of the citizens of towns upon lands of the United States, under certain circumstances,—extended by the act of May 28th, 1864, to the citizens of Denver,—the entry of the town site, which is declared in

gest to said Judge, by petition, any lots or lands that may have been omitted, and that any filing or filings theretofore made, which may appear to have been made on or before the 9th day of August, 1865, were in fact made after that time, and it shall be the duty of said Probate Judge to inquire into the same by such competent testimony as may be produced before him in that behalf, and if he shall be of opinion that such lots or lands have been wrongfully omitted, he shall thereupon include the same in such list, and proceed to advertise and sell the same.

SEC. 7. All moneys arising from any sale of said lots, or lands, shall be paid over by the purchaser to the treasurer of said city of Denver, for the use and benefit of the public schools of said city, and shall be distributed to the different boards of school directors of said city, as the city council may direct.

SEC 8. The city council shall audit and allow any reasonable bill or bills of said Probate Judge for making said list of lots, and for making said sales, and the expenses thereof, and shall order the same paid out of any money received as aforesaid.

SEC. 9. The owner or owners of any lots, or lands within the limits aforesaid, to which deeds have heretofore been made by any Probate Judge of said county, who may be the rightful owners thereof, holding the same by proper chain of title, under and from the Denver Town Company, may at any time hereafter apply to said Probate Judge for a deed, or deeds, to the same lots, or lands, and on such application, and the payment to him of his reasonable fees and expenses of executing the same, it shall be the duty of said Judge to execute and deliver a deed, or deeds, to such owner or owners, granting and conveying to such owner or owners the fee simple, in and to such lots and lands, notwithstanding the said claimants or their assignors may have failed to file their claim or claims to said lots or lands on or before the 9th day of August, 1865, as required by law, and such deed or deeds so as aforesaid issued by said Judge, shall vest in the grantee or grantees thereof the legal title in fee simple to said lots or lands.

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122-363

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CLERK.

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the act to be "in trust for the several use and benefit of the occupants thereof," enures to the benefit of the first actual occupants and possessors of the lots within the limits of the town site, no matter when that occupancy may begin, and not merely to those who are occupants at the date of the entry,

This construction, we contend, is expressly recognized in the case of Deffeback vs. Hawke, decided at the last term of this court.

That was an action of ejectment to recover certain premises situated in Lawrence county, Dakota, to which the plaintiff derived title under an entry made under the Mining Act, followed by letters patent of the United States. The defense was that the premises in question were settled upon, and with other lands laid out as a town site prior to the plaintiff's entry.

The general doctrine of the opinion is that the title to mineral lands cannot be obtained either under the pre-emption, homestead or town site laws; that the occupation of mineral lands, for trade or business, cannot initiate any right to it, nor delay proceedings for the acquisition of the title under the laws provided for the sale of lands of that character; that the entry, under the homestead or pre-emption laws of lands known at the time to be valuable for mineral deposits, will be invalid as to all parts of the lands so entered; but in respect to such an entry under the town site law, Mr. Justice Field is careful to say that the court is not to be understood as expressing any

opinion against the validity of the entry so far as it affects other than mineral lands, if there were any within the limits of the town site. After quoting from the opinion in the case of Steele vs. The Smelter Co., 106 U. S. 449, he proceeds to say, that "it would seem, therefore, that the entry of a town site, even though within its limits mineral lands are found, would be as important to the occupants of other lands as if no mineral lands existed. Nor do we see any injury resulting therefrom, nor any departure from the policy of the government, the entry and the patent being inoperative as to all lands known *at the time to be valuable for minerals, or discovered to be such before their occupation or improvement for residence or business under the town site title.*"

We submit that this is a distinct recognition of the doctrine for which we contend, to wit: that the first occupant of a lot or lots within the limits of a town site, entered under the provisions of the revised statutes, will be entitled to receive a conveyance from the probate judge or the corporate authorities in whose name the town site is entered. And that, while as to those parts of the entry known to contain valuable mineral deposits at the time of the entry, the entry and patent, if one should issue, are liable to be vacated; as to the residue of the lands included within the entry, the first occupant of any lot or lots will be entitled to a conveyance, and the entry and patent will be sustained as to him, provided, at the